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In The
Supreme Court of the United States

ORA MYRTLE RANSFORD and PATRICIA L. LEE
(as successor-in-interest to ALVA RANSFORD, decedent),

Petitioners,

v.

GRIFFIN WHEEL COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a conflict among the states and federal circuit courts on the important question of the scope of federal pre-emption of state laws regarding railroad safety. Two state supreme courts (Pennsylvania and Washington) hold, consistent with this Court's fundamental pre-emption jurisprudence, that railroad-safety pre-emption arises only from Congress's narrow, express pre-emption provision (49 U.S.C. section 20106) in its single, comprehensive statutory scheme for railroad safety (49 U.S.C. sections 20101-21311). But the California opinion below (like Alabama and two federal circuits) holds, contrary to this Court's jurisprudence, that state railroad-safety laws (including tort actions) are pre-empted not only narrowly by Congress's express provision but also much more broadly by *implication* from two of Congress's earlier acts that once governed only portions of railroad-safety law – until they were subsumed into the current, comprehensive scheme. This application of broad field pre-emption is harming not only railroad-injury victims but also the railroads themselves, who alone can be liable under the Federal Employers' Liability Act ("FELA") and thus are being saddled with all liability for railroad injuries, unable to seek indemnity from culpable defective-product manufacturers due to pre-emption based immunity.

QUESTION PRESENTED – Continued

We seek this Court's review to resolve these conflicts by answering this important federal question:

1. Did Congress, in enacting for all areas of "railroad safety" a single, comprehensive statutory scheme with a narrow express pre-emption provision specifically designed to involve the states in maintaining railroad safety, necessarily obviate any former interpretation of Congress's earlier, piecemeal railroad-safety acts as implying an additional, much broader intent to pre-empt all state regulation?

PARTIES TO THE PROCEEDINGS

Petitioners are Ora Myrtle Ransford and Patricia L. Lee, as successor-in-interest to Alva Ransford, decedent.*

The only respondent is Griffin Wheel Company, Inc., which is a wholly-owned subsidiary of Amsted Industries Incorporated.

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* Alva Ransford, plaintiff and petitioner below, died on May 30, 2009. After his death, he was replaced as a plaintiff in the trial court by his daughter, Patricia L. Lee, as his successor-in-interest.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ora Myrtle Ransford and Patricia L. Lee (as successor-in-interest to Alva Ransford, decedent) respectfully request that this Court grant this petition for a writ of certiorari to review the opinion of the California Court of Appeal, as to which the California Supreme Court denied discretionary review.

OPINIONS BELOW

In August 2007, petitioners commenced this action in the Superior Court of California, City and County of San Francisco, alleging plaintiff Alva Ransford's exposure to asbestos released during repairs of railroad cars from train products manufactured by respondent Griffin Wheel Company, Inc. ("Griffin").

On February 29, 2008, the trial court entered an order granting summary judgment to Griffin on the ground that petitioners' state tort claims are barred by pre-emption arising from the federal "Safety Appliances Acts" ("SAA") and "Locomotive Boiler Inspection Act" ("BIA").[1] This order, which is not

[1] As discussed fully in the Argument section below, the SAA and BIA, once codified at 45 U.S.C. sections 1-16 and 22-34, respectively, no longer exist as independent acts. In 1994, Congress repealed those former acts' provisions, incorporating a few of the provisions into Congress's comprehensive statutory scheme for railroad safety at 49 U.S.C. sections 20301 et seq. (SAA) and 20701 *et seq.* (BIA) and discarding the rest.

published and contains no official or unofficial citation, is reprinted in the Petitioners' Appendix ("App.") at 15-16. On March 12, 2008, the trial court entered judgment for Griffin. App. 17-18.

On July 9, 2009, the California Court of Appeal, First Appellate District, Division Two, affirmed the summary judgment on the ground that petitioners' claims are pre-empted by the SAA and BIA. The appellate court's opinion, which is not published but is unofficially reported at 2009 WL 1994740, is reprinted at App. 1-14.

On July 30, 2009, the California appellate court denied petitioners' petition for rehearing in that court. This order, which is not officially or unofficially reported, is reprinted at App. 19.

On September 23, 2009, the California Supreme Court denied petitioners' petition for discretionary review of the California appellate court's opinion. This order denying review, which is not published or officially or unofficially reported, is reprinted at App. 20.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the California Court of Appeal, filed July 9, 2009, as to which rehearing was denied on July 30, 2009, and as to which discretionary review by the California Supreme Court was denied on September 23, 2009.

This Court has jurisdiction under 28 U.S.C. section 1257 because the challenged California opinion raises a federal question regarding the preemptive effect of Congress' railroad-safety statutes (49 U.S.C. §§ 20101-21311).

STATUTES INVOLVED IN THE CASE

This petition presents the question of preemption arising from Congress's statutory scheme governing railroad safety, codified at 49 U.S.C. sections 20101-21311. The relevant provisions (including the few surviving provisions from the former SAA and BIA) are lengthy and are thus reprinted in the Appendix at App. 21-32.

But two pivotal provisions warrant reproduction here:

49 U.S.C. § 20101 – "Purpose":

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

49 U.S.C. § 20106 – "Preemption":

(a) *National uniformity of regulation.*

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) *Clarification regarding State law causes of action.*

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject

matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) *Jurisdiction.*

Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

STATEMENT OF THE CASE

Introduction

This case raises the federal question of the preemptive effect of Congress's comprehensive statutory scheme governing railroad safety – now codified at 49 U.S.C. sections 20101-21311.

At the turn of the 20th Century, as railroad use in industrial America flourished, Congress enacted piecemeal legislation addressing *some* areas of railroad

safety. The SAA, a series of measures enacted from 1893 to 1910 and formerly codified at 45 U.S.C. sections 1-16, addressed regulation of railcar safety devices. And the BIA, several measures enacted in 1911 and formerly codified at 45 U.S.C. sections 22-34, addressed regulation of locomotives and their parts. Neither of these acts contained any express pre-emption provision or language. But this Court held that the acts were then so broad that they evidenced Congress's "implied" intent to occupy the respective "fields" of train "safety appliances" (SAA) and "locomotive safety" (BIA) and thus to pre-empt any state regulation in those areas. *See Southern Ry. Co. v. R.R. Comm., Indiana*, 236 U.S. 439, 35 S.Ct. 304 (1915) (SAA); *Napier v. Atlantic Coast Line*, 272 U.S. 605, 47 S.Ct. 207 (1926) (BIA). Over the following decades, courts construed this implied "field" pre-emption under the SAA and BIA to pre-empt not only state regulations in the affected areas but also state tort claims touching on those areas.

By the end of the 1960s, however, Congress determined that the earlier acts were not achieving railroad safety and thus in 1970 enacted the Federal Railroad Safety Act ("FRSA") as a comprehensive scheme that, according to its express "purpose," was intended to govern "safety in *every area* of railroad operations." *See* 49 U.S.C. § 20101 (App. 21) (emphasis added).

And this time, Congress did not remain silent on pre-emption. Instead, Congress included in the FRSA an express provision (titled "Pre-emption") declaring

its pre-emptive intent that, as to *all* laws "related to railroad safety," *no* pre-emption exists unless and until a federal regulation is enacted to govern the same "subject matter":

> A State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106, subd. (a)(2) (App. 21-22).

Although the earlier SAA and BIA had addressed discrete sub-areas of railroad safety (safety appliances and locomotive safety), Congress in 1970 did not initially recodify the former acts or subsume them into the new, comprehensive FRSA scheme. But in 1994, Congress did recodify the FRSA, SAA, BIA, and all federal laws related to railroad safety into one single statutory "Safety" scheme: United States Code, Title 49 ("Transportation"), Subtitle V ("Rail Programs"), Part A ("Safety"). *See* 49 U.S.C. § 20101 *et seq.* This scheme includes a handful of the former provisions of the SAA (now §§ 20301-20306, App. 23-28) and BIA (now §§ 20701-20703; App. 28-32) – but Congress discarded the rest of those former acts' provisions.

Most important, Congress placed in the "General" provisions of the new comprehensive "Safety" scheme its express pre-emption provision (from the FRSA) declaring that, as to "railroad safety" laws,

state action is pre-empted only when a federal regulation is enacted on the specific subject matter. *See* 49 U.S.C. § 20106.

It is against this backdrop that the present controversy lies.

Federal Question Raised at All Levels Below

Decedent Alva Ransford, plaintiff and petitioner below, who for 39 years repaired and replaced asbestos-containing brakes on railroad locomotives and cars, died on May 30, 2009 of mesothelioma caused by exposure to asbestos.

In August 2007, Alva and his wife Ora Ransford filed suit in the California Superior Court, City and County of San Francisco, against respondent Griffin Wheel Company, Inc. (Griffin), alleging exposure to asbestos released during Ransford's repair and replacement of train brake shoes manufactured by Griffin. App. 1-2.

Griffin moved for summary judgment on the sole asserted ground that petitioners' tort claims are barred by "field" pre-emption supposedly still arising from the SAA and BIA. *See* Appellant's Appendix on appeal ("AA") at 42-50. Griffin did not assert that petitioners' claims are also barred by Congress's express pre-emption provision for railroad-safety laws (49 U.S.C. section 20106). Instead, Griffin conceded

that the express provision does *not* pre-empt the claims[2] but argued that field pre-emption under the "distinct" SAA and BIA continues to exist as an alternative, simultaneous pre-emption scheme that bars petitioners' claims. AA at 50:9-26.

Petitioners immediately asserted in the trial court the federal question posed in this petition, arguing that any interpretation of the former SAA and BIA as *implying* Congress's intent to pre-empt any state laws touching on the "fields" of safety appliances and locomotive safety is no longer tenable because Congress has since *expressed* a contrary intent for all railroad-safety areas. AA at 493-496. Accordingly, petitioners argued, Congress's "express pre-emption provision govern[s] all laws on any rail-safety subject" – so that no alternative implied "field" pre-emption exists. AA at 496:8-11.

The trial court granted summary judgment, ruling that "pursuant [to] the [BIA] and [SAA], the plaintiffs['] causes of action are pre-empted" and entering judgment for Griffin. App. 16-18.

Petitioners appealed to the California Court of Appeal, arguing that the pre-emption-based summary judgment should be reversed because "[i]mplied BIA

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[2] It is undisputed in this action that no federal regulation covers the "subject matter" of asbestos in train parts, so that Congress's express pre-emption provision (49 U.S.C. section 20106) does not pre-empt petitioners' claims.

and SAA 'field' pre-emption *no longer exists* – express FRSA pre-emption governs (and does not bar plaintiffs' claims)." Appellants' Opening Brief on appeal, California Court of Appeal No. A121620 ("AOB") at 9; *see* AOB at 1-2, 9-32.

The California appellate court, in an opinion filed July 9, 2009, affirmed the summary judgment on the ground that petitioners' "causes of action are pre-empted" by SAA and BIA field pre-emption. App. 2. The appellate court rested its decision on two earlier decisions of the California Supreme Court that had applied SAA and BIA field pre-emption after Congress had enacted its express pre-emption provision. App. 2-10 (*citing Carrillo v. ACF Indus., Inc.*, 980 P.2d 386, 20 Cal.4th 1158 (Cal. 1999), *cert. denied*, 528 U.S. 1077, 120 S.Ct. 793 (2000) ("*Carrillo*"); *Scheiding v. General Motors Co.*, 993 P.2d 996, 22 Cal.4th 471 (Cal. 2000), *cert. denied*, 531 U.S. 958, 121 S.Ct. 383 (2000) ("*Scheiding*")). Despite petitioners' showing that the *Carrillo* and *Scheiding* courts had not even been presented with the question of whether former SAA and BIA field pre-emption was obviated by Congress's express pre-emption provision[3] (*see* AOB at 25-27), the California appellate

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[3] Because neither *Carrillo* nor *Scheiding* involved the question of the effect of Congress's express pre-emption provision on the former interpretation of field pre-emption, that issue was not raised in those cases' certiorari petitions that this Court denied. *See* 1999 WL 33632488 (*Carrillo* cert. petition); 2000 WL 33999304 (*Scheiding* cert. petition).

court ruled that *Carrillo* and *Scheiding* control in California – and thus held that it is "clear beyond any reasonable doubt that both the SAA and the BIA continue to have an existence and potency that is completely independent of the FRSA" and its express pre-emption provision. App. 8.

Petitioners petitioned the appellate court for a rehearing, but the petition was denied. App. 19.

Petitioners then petitioned the California Supreme Court for discretionary review of the appellate court's opinion, again arguing specifically that former SAA and BIA field pre-emption "no longer exist" because "Congress's express intent" is manifestly that "state regulations on all areas of railroad safety are not pre-empted unless and until a federal regulation is adopted on the same subject matter." Appellants' Petition for Review, California Supreme Court No. S175613 ("Pet. Rev.") at 12; *see* Pet. Rev. at 1-17.

On September 23, 2009, the California Supreme Court summarily denied petitioners' petition for review. App. 20.

ARGUMENT: REASONS TO GRANT CERTIORARI

This case presents three compelling grounds for review under this Court's Rule 10. The California

opinion below decides an "important question of federal law": the nationwide pre-emptive effect of Congress's statutory scheme designed to "promote safety in every area of railroad operations." *See* 49 U.S.C. § 20101 *et seq.*; *see also Wyeth v. Levine*, ___ U.S. ___, 129 S.Ct. 1187 (2009) (certiorari granted based on "importance of the pre-emption issue"). California's answer to this important federal question raises three Rule 10 grounds for review:

1. *Conflict with decisions of this Court*: California's holding that the former SAA and BIA continue to "imply" a broad pre-emptive intent far beyond Congress's express narrow intent "conflicts with relevant decisions of this Court" that declare repeatedly that no federal pre-emption exists unless it is "the clear and manifest purpose of Congress" (*e.g.*, *Wyeth*, 129 S.Ct. at 1194-1195) – and that the "best evidence of Congress's pre-emptive intent" is "necessarily" found in the "plain wording" of Congress's "express pre-emption clause" (*e.g.*, *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732 (1993)). *See* Supreme Court Rule ("Rule") 10(c); Part I below.

2. *Conflict among states and circuits*: California here, along with two federal circuit courts of appeals and the Alabama Supreme Court, has decided the "important question" of railroad-safety pre-emption "in a way that conflicts with" the highest courts of Pennsylvania and Washington, which have correctly recognized that Congress expressly declared its pre-emptive intent for railroad-safety laws in its express

pre-emption provision (49 U.S.C. section 20106), so that any interpretation of the former SAA and BIA as implying much broader "field" pre-emption conflicts with Congress's express intent and is not valid. *See* Rule 10(b); Part II below.

3. *Important federal question that should be settled*: The important federal question of railroad-safety pre-emption "has not been, but should be, settled by this Court" because the California approach not only violates Congress's intent but also (1) undermines Congress's purpose of promoting railroad safety, (2) unfairly saddles the railroads with *all* liability for injuries to their employees, even injuries caused wholly or substantially by a third-party product manufacturer, and (3) leaves many victims of railroad-related injuries without *any* recourse against any culpable party. *See* Rule 10(c); Part III below.

I. CONFLICT WITH THIS COURT'S DECISIONS: THE OPINION BELOW FINDS PRE-EMPTION THAT IS FLATLY CONTRARY TO CONGRESS'S EXPRESS INTENT.

The California opinion below should be reviewed on certiorari because its decision on the important federal question of railroad-safety pre-emption violates this Court's repeated command that pre-emption does not exist unless it is Congress's "clear and manifest purpose" – and here, to the contrary,

Congress's manifest purpose is that no pre-emption exists.

A. The "Ultimate Touchstone" of Pre-Emption is Congress's Intent – And Any Express Pre-Emption Provision Controls.

Federal pre-emption "fundamentally is a question of congressional intent." *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270 (1990). Thus, as this Court recently iterated in *Wyeth v. Levine*, pre-emption analysis must always "be guided by two cornerstones of [this Court's] pre-emption jurisprudence":

1. The "purpose of Congress is the ultimate touchstone in every pre-emption case"; and

2. Pre-emption analysis always "start[s] with the assumption" that no pre-emption exists "unless that [is] the clear and manifest purpose of Congress." *Wyeth*, 129 S.Ct. at 1194-1195 (*quoting Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240 (1996)).

This Court has consistently recognized three types of pre-emption: (1) express pre-emption (stated in Congress's statutory language); (2) implied "field" pre-emption (gleaned from Congress's implied intent to "occupy" the relevant "field" of law); and (3) actual "conflict" pre-emption (found when state law conflicts with federal law). *See English*, 496 U.S. at 78-79.

When Congress has stated its pre-emptive intent expressly, that intent controls. As this Court declared in *English*, "when Congress has made its [pre-emptive] intent known through explicit statutory language, the courts' task is an easy one" (*English*, 496 U.S. at 79) – the express pre-emption provision controls. Likewise, this Court declared in *CSX Transportation* that if the statute at issue "contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent." *CSX Transportation*, 507 U.S. at 664.

Thus, courts can properly look for implied "field" pre-emption only when Congress has *not* stated its pre-emptive intent expressly. As this Court held in *English*, in summarizing the three types of pre-emption, "field" pre-emption may be inferred from congressional intent to "occupy" the field only "*in the absence of explicit statutory language.*" *English*, 496 U.S. at 79 (emphasis added); *accord Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608 (1992) (field pre-emption may be inferred "[i]n the *absence of* any express congressional command").

Finally, permeating this pre-emption analysis is the strong "presumption *against* pre-emption," a presumption that applies whether the claimed pre-emption is express, field, or conflict pre-emption. *See Wyeth*, 129 S.Ct. at 1194-1195 and n.3 ("this Court has long held" that the "presumption against pre-emption" applies to implied pre-emption); *Altria*

Group, Inc. v. Good, __ U.S. __, 129 S.Ct. 538 (2008) (presumption applies to "questions of express or implied pre-emption").

B. The Conflict: California Ignores Congress's Narrow Express Pre-Emption Clause That Encourages State Participation To Apply Implied Field Pre-Emption That Eliminates State Participation.

The California opinion below conflicts with this Court's pre-emption jurisprudence by deriving Congress's pre-emptive intent for railroad-safety laws not from Congress's narrow express pre-emption provision in its modern, comprehensive statutory scheme (as this Court requires) but instead by inferring a much broader pre-emptive intent from Congress's earlier acts (the SAA and BIA) that once partially governed railroad safety but that have since been subsumed within the current, comprehensive scheme.

1. Congress's express provision for narrow pre-emption governs, obviating any interpretation of Congress's prior acts as implying broader field pre-emption.

As detailed in the Statement of the Case above, Congress first addressed railroad safety a century ago with a piecemeal statutory scheme that included the SAA (regulating train safety appliances, formerly 45

U.S.C. sections 1-16) and the BIA (regulating locomotive equipment, formerly 45 U.S.C. sections 22-34). Because those acts lacked any express pre-emption language showing Congress's intent, this Court interpreted the acts as evidencing Congress's intent to "occupy" the respective fields of safety appliances and locomotives – and thus as impliedly pre-empting any state regulation of those fields. *See Southern Ry.*, 236 U.S. 439; *Napier*, 272 U.S. 605.

When those piecemeal statutes were all that governed railroad safety, interpreting the SAA and BIA as implying field pre-emption was proper and sensical. The statutes lacked any express pre-emption language, so the courts were free to interpret them as implying Congress's intent to occupy the respective railroad-safety fields of safety appliances and locomotives and thus to pre-empt broadly any state regulation in those areas.

But the propriety of that interpretation was obviated when Congress *expressed* a different pre-emptive intent for *all areas* of "railroad safety." *See* 49 U.S.C. § 20106 (App. 21-23). That express pre-emption clause was enacted as part of Congress's comprehensive statutory scheme to assure "safety in *every area* of railroad operations." *See* 49 U.S.C. § 20101 (App. 21) (emphasis added). And the pre-emption provision declares unequivocally Congress's narrow intent that no state law or regulation "related to railroad safety" is pre-empted *unless* a specific federal regulation governs the exact subject matter of the state law:

> A State may adopt or continue in force a law, regulation, or order related to *railroad safety* . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106, subd. (a)(2) (App. 21-22) (emphasis added).

Congress's intent cannot be stated more clearly: the express pre-emption provision applies to *every* law or regulation "related to railroad safety" – thus necessarily including the sub-areas of "safety appliance" safety and "locomotive" safety once governed only by the former SAA and BIA. Once Congress *stated* this intent expressly, there no longer existed any reason for courts to glean an implied pre-emptive intent from Congress's earlier acts – let alone a completely different intent.

Moreover, even if Congress's express pre-emption provision could somehow be said to be ambiguous as to whether all laws "related to railroad safety" includes those laws regulating train safety appliances and locomotives (the former purview of the SAA and BIA), the presumption *against* pre-emption requires the resolution of any such ambiguity against pre-emption. *See Altria*, 129 S.Ct. at 543 (*quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S.Ct. 1788 (2005)) ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'").

2. Legislative history confirms Congress's intent to apply its narrow pre-emption provision to laws in all areas of railroad safety.

That Congress intends its express pre-emption provision to apply to *all* railroad-safety laws (thus including laws affecting safety appliances and locomotives) is corroborated by legislative history. In June 1970, just before Congress enacted its comprehensive railroad-safety scheme (as the FRSA), a House Committee recommended passage in a lengthy report, which is published at 1970 United States Code Cong. and Admin. News ("U.S.C.C.A.N.") at 4104 ("House Rep.").[4] This House Report shows Congress's specific intent to consolidate and supplement the existing, piecemeal railroad-safety acts (including the SAA and BIA), creating new "broadscale federal legislation" to effect a "substantial upgrading" of "railroad safety." *Id.* at 4104, 4105. The report expressly acknowledged that prior "legislation," including the SAA and BIA, had previously addressed only "certain phases of railroad safety." *Id.* at 4105. But the new scheme followed the "unanimous recommendation" that "broad federal regulatory authority over *all areas of railroad safety* be enacted." *Id.* at 4108. Thus, the scheme covered all areas of railroad safety: the "most comprehensive rail safety legislation ever reported to the Congress." *Id.* at 4106.

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[4] This House report is part of the record below. *See* AA 836-862.

Moreover, the legislative history reflects Congress's specific intent to *involve the states* in promoting rail safety *until* a governing federal regulation exists. The House Report noted that the FRSA was enacted because the "time is now here for broadscale federal legislation *with provisions for active state participation* to assure a much higher degree of railroad safety." House Rep. at 4108 (emphasis added); *accord id.* (recommending "administration of the rail safety program . . . through a federal-state partnership"). Indeed, the Report's section titled "The Role of the States in Rail Safety" indicates that Congress intended to replace any earlier "field" pre-emption with the new express pre-emption scheme. The Report noted that "[a]t the present time where the federal government has authority, with respect to rail safety, it pre-empts the field." *Id.* But Congress intended the FRSA to *change* this approach: "With respect to the reported bill [creating the FRSA], the task force recommended that existing state requirements *remain in effect until pre-empted by federal action*." *Id.* (emphasis added). Accordingly, Congress provided that, as to *all* railroad-safety laws, pre-emption applies only upon actual federal regulation:

> The bill as passed by the Senate preserve[s] existing state statutes *until pre-empted*. It also permit[s] the states to regulate in new areas *until pre-empted*.

Id. at 4109 (emphasis added).

In light of this history, it cannot possibly be concluded that Congress, in enacting its comprehensive scheme to partner with the states to promote railroad safety, nevertheless intended to retain former "field" pre-emption that bars any state regulation whether or not a governing federal regulation exists.

To the contrary, Congress's specific intent is to *involve* the states in promoting railroad safety. California's conclusion that Congress also intends simultaneously to *pre-empt* universally all state regulation in the sub-areas of safety appliances and locomotives is simply not tenable.

3. The 1994 Recodification: Congress repealed the former "SAA" and "BIA" and blended some (but not all) of their provisions into Congress's single, comprehensive scheme for railroad safety.

Next, any possible doubt that Congress intends its express pre-emption provision to apply to all railroad-safety laws (including laws regulating safety appliances and locomotives) was removed when Congress in 1994 recodified all of the former rail-safety acts (including the SAA, BIA, and FRSA) into its current, single, comprehensive statutory "Safety" scheme – with Congress's narrow express pre-emption provision applying to the entire scheme.

This 1994 recodification left intact *one* scheme for railroad "Safety": United States Code, Title 49 ("Transportation"), Subtitle V ("Rail Programs"), Part A ("Safety"). *See* 49 U.S.C. § 20101 *et seq.* And that single scheme's "General" provisions include Congress's narrow, express pre-emption provision as to all "railroad safety" laws. *See* 49 U.S.C. § 20106.

Hence, after this recodification, the former piecemeal safety acts – SAA, BIA, and FRSA – no longer exist. Indeed, as part of the 1994 recodification, Congress *repealed* the former "SAA" and "BIA" provisions (*see* former 45 U.S.C. §§ 1-16 and 22-34). And Congress did not move those provisions into the new scheme *in toto*. Instead, Congress kept some of the provisions but discarded the rest: of the former SAA's 16 provisions, just six remain (49 U.S.C. §§ 20301-20306, App. 23-28); and of 13 former BIA provisions, just three remain (49 U.S.C. §§ 20701-20703, App. 28-32).

There is no "SAA" or "BIA" anymore. There is now Congress's single railroad "Safety" scheme, with one governing pre-emption provision that Congress intentionally made quite narrow. No additional, broad field pre-emption can properly be inferred.

Because the California opinion below conflicts with this Court's jurisprudence holding that Congress's pre-emptive intent is found in its express pre-emption provision, certiorari is warranted under Rule 10(c) and should be granted.

II. CONFLICT AMONG THE STATES AND CIRCUITS.

Certiorari is warranted also under Rule 10(b) because this case presents a conflict among the states and circuits.

In addition to California here, two federal circuits and the Alabama Supreme Court have ruled that, despite Congress's enactment of its narrow express pre-emption provision, the former SAA and BIA nevertheless continue to imply an alternative scheme of broad field pre-emption:

- *Ninth Circuit*: "We conclude that the language and structure of the [FRSA] indicate a congressional intent to leave the [BIA] intact, including its preemptive effect." *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983).

- *Sixth Circuit*: "[T]he preemptive effect of the BIA on state regulation of locomotive equipment was not affected or modified by the [FRSA] which was enacted in 1970." *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094, 118 S.Ct. 1560 (1997).

- *Alabama*: "We disagree" that "Congress's enactment of the [FRSA] in 1970 altered the preemptive effect of the [BIA]." *General Motors Corp. v. Kilgore*, 853 So.2d 171, 179 (Ala. 2002).

But two state Supreme Courts (Pennsylvania and Washington) hold to the contrary that Congress's enactment of its express pre-emption provision

governs and obviates any interpretation of the former SAA and BIA as implying broader field pre-emption:

- *Pennsylvania*: The "clear intent of Congress," as "articulated in the [FRSA] of 1970," is "to permit state regulation of railroad safety until pre-empted," thus "mandat[ing] the conclusion that the federal government has not preempted the entire field." * * * "While the broad language of the [BIA] at one time could have been interpreted as reflecting Congressional intent to preempt the entire field of railroad safety, the enactment of [the FRSA's express pre-emption provision] no longer permits that reading." *Norfolk and W. Ry. Co. v. Pennsylvania Pub. Util. Comm.*, 413 A.2d 1037, 1041-1042, 1043 (Pa. 1980).

- *Washington*: "We must conclude that, absent promulgation of federal administrative regulations relating to [locomotive] spark arresters, the [BIA] does not pre-empt the power of individual states to require such devices. This conclusion is supported by section 205 [the express pre-emption provision] of the [FRSA]. . . ." *State v. Chicago, Milw., St. Paul and Pac. RR Co.*, 484 P.2d 1146, 1149 (Wash. 1971), *app. dismissed sub nom. Chicago, Milw., St. Paul and Pac. RR Co. v. Washington*, 404 U.S. 804, 92 S.Ct. 108 (1971).

This Court should grant certiorari to resolve this conflict among the states and circuits on the important question of federal pre-emption of railroad-safety laws.

III. QUESTION TO BE SETTLED: CALIFORNIA'S BROAD HOLDING VIOLATES CONGRESS'S INTENT, UNDERMINES RAILROAD SAFETY, HARMS THE RAILROADS, AND DEPRIVES INJURY VICTIMS OF COMPENSATION.

Finally, certiorari is warranted also because the important federal question of railroad-safety preemption "has not been, but should be, settled by this Court." *See* Rule 10(c).

This important question should be settled by this Court because the holding of California (and Alabama and two circuits) that broad SAA and BIA field preemption still exists (1) rests on flawed analysis that ignores Congress's express pre-emptive intent in favor of supposed legislative-history and policy concerns that do not exist, (2) defeats Congress's legislative purpose by *undermining* railroad safety, (3) unfairly saddles the *railroads* with all liability for injuries to railroad employees, even those injuries caused wholly or substantially by third-party product manufacturers, and (4) in many cases prevents victims of railroad-related injuries from recovering from any culpable party.

A. California ignores Congress's Express Pre-emptive Intent in Favor of Phantom Legislative-History and Policy Concerns.

The holding of California (and of the Sixth and Ninth Circuits and Alabama) that Congress's express pre-emption provision did not affect SAA or BIA field pre-emption rest wholly on the 1982 federal district court opinion in *Consolidated Rail Corp. v. Pennsylvania P.U.C.*, 536 F.Supp. 653 (E.D.Pa. 1982), *summarily aff'd*, 696 F.2d 981 (3d Cir. 1982), *summarily aff'd sub nom. Pennsylvania P.U.C. v. Consolidated Rail Corp.*, 461 U.S. 912 (1983) – a decision that is fundamentally flawed, ignoring Congress's express pre-emptive intent to promote supposed legislative-history and policy concerns.[5]

In *Consolidated Rail*, a railroad in 1982 challenged a Pennsylvania statute requiring locomotives to have "speed recorders and indicators." *Consolidated Rail*, 536 F.Supp. at 654. The railroad asserted both express pre-emption (under Congress's express provision) and implied field pre-emption (under the BIA). *Id.* The district court correctly ruled that Congress's express provision pre-empted the Pennsylvania statute because the "[FRA] has adopted a rule governing speed indicators in locomotives." *Id.* at 657

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[5] *See Marshall*, 720 F.2d at 1153 (Ninth Circuit following *Consolidated Rail*); *Springston*, 130 F.3d at 245 (Sixth Circuit following *Marshall*); *Kilgore*, 853 So.2d at 179 (Alabama following *Consolidated Rail*).

and n.16 (*citing* 49 C.F.R. § 229.117(a)); *see* 49 U.S.C. § 20106 (state laws pre-empted when federal agency enacts regulations on the specific subject matter). But the district court also found implied "field" pre-emption (under the BIA), ruling (unnecessarily) that "Congress did not intend the pre-emption provision of the [FRSA] to modify the total-pre-emptive effect of the [BIA]." *Id.* at 657.

The district court's reasoning for this ruling is erroneous because it ignores Congress's express intent of narrow pre-emption for all laws "related to railroad safety." *See* 49 U.S.C. § 20106. Instead, the court found a contrary intent to continue additionally to apply broad field pre-emption (to locomotive safety laws) based on two stated reasons: (1) "the legislative history of the [FRSA] shows that Congress intended no change to the [BIA]"; and (2) "elimination of the total-pre-emption test for locomotive equipment runs contrary to the purpose of the [FRSA]." *Consolidated Rail*, 536 F.Supp. at 656. This was improper – field pre-emption can properly be found only "in the absence of explicit statutory language." *English*, 496 U.S. at 79; *accord Cipollone*, 505 U.S. at 516.

But even if the district court could properly have ignored Congress's express intent, the court's stated reasons to find continued field pre-emption simply lack merit:

1. *Legislative history*: *Consolidated Rail* asserted that the FRSA's legislative history "shows that Congress intended no change to the [BIA]," citing a

statement in the House Report (discussed above in this petition) that the BIA (and SAA) had "served well," so that Congress in 1970 "chose to continue" them "without change." *See Consolidated Rail*, 536 F.Supp. at 656 (*citing* 1970 U.S.C.C.A.N. at 4105). The *Consolidated Rail* court concluded that this "decisio[n]" by Congress "negate[d] implied modification of any part of the [BIA], including its total occupation of the locomotive-equipment field." *Id.*

But that conclusion fails because any former "field" pre-emption was not a "part of" the BIA (or SAA) – it was a judicial *interpretation* of what Congress, in the absence of any express pre-emption language, had impliedly intended in passing those earlier acts. But when Congress subsequently expressed its intent for pre-emption as to all areas of railroad safety, it negated any need to glean any implied intent. Thus, after Congress stated its express intent in the FRSA, the former interpretation of a different "implied" congressional intent was no longer necessary – or tenable.

Read properly, the cited legislative history reflects that Congress indeed decided (when enacting the FRSA) to leave intact, "without change," the BIA's and SAA's *affirmative* provisions providing regulatory authority over locomotives and safety appliances. Congress did not choose (at that time) to recodify the federal power to enact regulations covering those subject matters. Instead, Congress kept the BIA and SAA provisions intact, providing for continued regulation of the discrete fields they covered.

But Congress, by keeping those regulatory provisions intact, did not also declare that the former *interpretation* of implied field pre-emption was still valid. To the contrary, the same House Report shows that Congress decided that a much less pervasive pre-emption scheme – intentionally *involving* the states and pre-empting state law only when actual federal regulations exist – is the best way to promote railroad safety. *See* House Rep. at 4105 (AA 838) ("there is strong consensus which makes it appear clearly that the time is now here for broadscale federal regulation with provisions for *active state participation* to assure a much higher degree of railroad safety"); *accord* 49 U.S.C. § 20106 (allowing state regulation until a federal regulation governs the specific subject area).

Moreover, declaring this express intent for all railroad-safety areas did not (as *Consolidated Rail* opined) "modify" the BIA or SAA. It simply declared for the first time Congress's *express* pre-emptive intent for all railroad-safety areas, thereby negating the need to infer its intent – and thus negating interpretations of the earlier acts as implying a contrary intent to pre-empt the field and bar any state regulation.

Finally, the *Consolidated Rail* district court tried to bolster its legislative-history analysis by noting that Congress, in enacting the FRSA in 1970, did not then "repea[l]" the BIA or "recodif[y] or subsum[e] it within the comprehensive [FRSA]." *Consolidated Rail*, 536 F.Supp. at 656. But that reasoning is no longer valid. As noted above, in 1994 (after the 1982

Consolidated Rail order), Congress *did* "recodify" the BIA (and the SAA) and "subsume" their provisions into Congress's "comprehensive" statutory scheme for railroad "Safety": United States Code Title 49, Subtitle V, Part A ("Safety") (49 U.S.C. §§ 20101-21311). Hence, there now exists *one* federal regulatory scheme for railroad "Safety." And that "Safety" scheme, in its general provisions, contains Congress's express pre-emption provision (originally enacted in the 1970 FRSA) – which thus applies to the *entire* scheme.

2. *Policy*: Next, *Consolidated Rail*'s second stated "reason" to find continued implied pre-emption was that changing the pre-emption of locomotive-safety laws from universal field pre-emption to Congress's narrow express pre-emption would "run counter to Congress's purpose of uniform national regulation." *Consolidated Rail*, 536 F.Supp. at 656-657.

But this reasoning too lacks merit. The express "purpose" of Congress's comprehensive statutory scheme is not "uniform" regulation but railroad *safety*: "The *purpose* of this chapter is to promote *safety* in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101 (emphasis added). National uniformity of regulations is simply one means that can help achieve the ultimate "safety" purpose. But achieving uniformity cannot properly be pursued at the expense of railroad safety.

Moreover, Congress has determined that railroad safety is best achieved by *allowing* the states to "adopt" regulations "until" specific federal regulations pre-empt them. *See* 49 U.S.C. § 20106, subd. (a)(2) (App. 21-22); House Report at 4105 (AA 838) (comprehensive statutory scheme enacted as "broadscale federal legislation with provisions for active state participation").

In sum, the four states and federal circuits that continue to apply SAA and BIA field pre-emption despite Congress's express contrary intent rest on a district court decision that not only violates fundamental pre-emption analysis but is fundamentally flawed.[6]

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[6] Contrary to Griffin's contention below, the fact that *Consolidated Rail* was summarily affirmed does not suggest that this Court agrees that SAA and BIA field pre-emption survives. The Third Circuit "affirmed" the district court in an unpublished decision (696 F.2d 981), and this Court then summarily affirmed the Third Circuit (461 U.S. 912). But because the district court's order rested on alternative rulings of express pre-emption *and* field pre-emption, the reviewing courts' summary affirmances of the result do not indicate affirmance of the court's reasoning regarding continued field pre-emption. *See Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238 (1977) ("Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below. When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached.")

B. California's Holding of Continued Broad Field Pre-emption Defeats Congress's Scheme and Undermines Railroad Safety.

The holding of California (and Alabama and two circuits) does not simply run counter to Congress's express pre-emptive intent – it *undermines* Congress's express purpose of promoting railroad safety. *See* 49 U.S.C. § 20101 ("purpose" of statutory scheme is to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents").

As noted above, Congress in 1970 determined that its then-existing piecemeal statutory scheme, including the SAA and BIA, was not achieving railroad safety. Thus, Congress enacted a comprehensive scheme to cover "every area" of railroad safety. And Congress specifically determined that safety would best be promoted by allowing "active state *participation*," manifested in Congress's narrow express pre-emption provision that allows state regulation until a federal regulation is enacted.

But this specific, intended scheme of state participation is *gutted* if (as the California opinion below holds) the former SAA and BIA continue to imply pre-emption of any state regulation of the entire "fields" of "safety appliances" and "locomotives." Indeed, those sub-areas arguably comprise most of the overall field of railroad safety. Under the California holding, states cannot regulate (by laws or

tort claims) *anything* having to do with locomotives or train "safety" parts.

This leaves massive holes in Congress's safety scheme. Congress wants the states to fill those holes, regulating any railroad-safety area that lacks a governing federal regulation. But under the Opinion, states cannot participate in this intended way.

Moreover, this result does not just violate Congress's express intent, it violates Congress's purpose of railroad safety. Under the Opinion, train-part manufacturers like Griffin (brake shoes) are *immune* from liability for any defects in their products, without exception. Thus, those manufacturers can market defective parts without fear of liability.

This result actually encourages manufacturers to market defective products – or at a minimum not to worry whether their products are defective. Any manufacturer who is immune from liability for defects in its products has no incentive to eliminate such defects and thus will find it economically beneficial to cut corners and market products with defects, without fear of reprisal. Without question, allowing an unbridled flood of defective train products into the market undermines railroad safety.

C. Immunizing Culpable Product Manufacturers Via Broad Field Pre-emption Unfairly Places All Liability for Injuries to Railroad Workers on the *Railroads*.

This Court should settle this important pre-emption question also because immunizing culpable manufacturers of defective train products (as California and other jurisdictions do) unfairly saddles the American railroad industry with all liability for railroad-related injuries.

When a railroad employee is injured on the job, the Federal Employers' Liability Act ("FELA") allows the employee to bring a negligence action against the railroad employer *only*. *See* 45 U.S.C. § 51; *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 165-166, 123 S.Ct. 1210 (2003) ("Under the FELA, an employee who suffers an 'injury' caused 'in whole or in part' by a railroad's negligence may recover his or her full damages from the railroad, regardless of whether the injury was also caused 'in part' by the actions of a third party.").

But no such statutory remedy is authorized against anyone else, including any third-party manufacturers of products used on trains. Thus, the manufacturer is fully immune from liability – the employee cannot sue the manufacturer, and the railroad cannot seek indemnity from the manufacturer.

In cases with joint culpability, the railroads are unfairly being saddled with all liability. Continuing to apply broad field pre-emption hurts the railroads.

D. In Many Cases, Immunizing Culpable Third-Party Manufacturers Leaves the Injured Victim Without Any Recourse.

Finally, this pre-emption question should be settled by this Court now also because continuing to recognize broad field pre-emption deprives countless victims of railroad-related injuries of any recovery whatsoever.

Although injured railroad employees have a FELA cause of action against their employers, they still must prove railroad negligence. *See* 45 U.S.C. § 51; *Norfolk & Western*, 538 U.S. at 165-166. But in cases where the employee is injured by a defective *product*, often the railroad did not know that the product was defective and thus was not negligent. In such a case, the injured employee has no remedy against anyone.

Likewise, FELA does not provide any remedy to non-railroad-employees injured by train parts: *e.g.*, a passenger injured by a defective train part; a by-stander injured at a railroad yard; and a spouse of an injured employee. If these people are injured by a product defect, they should be able to recover from the product's manufacturer – but under California's holding of broad field pre-emption, the manufacturer is immune.

In sum, the pre-emption question raised in this case is critical to protecting not only American citizens injured by defective train parts but also the nation's railroads.

CONCLUSION

This Court should grant certiorari to settle this important question of federal pre-emption.

Respectfully submitted,

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing, or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ALVA RANSFORD et al., Plaintiffs and Appellants, v. GRIFFIN WHEEL COMPANY, INC., Defendant and Respondent.	A121620 (San Francisco County Super. Ct. No. CGC-07-274342) (Filed Jul. 9, 2009)

Plaintiff Alva Ransford is dying of mesothelioma he claims is caused by asbestos encountered in 39 years of repairing and replacing brakes on locomotives and rolling stock owned by the Union Pacific and Southern Pacific railroads. For 15 of those 39 years, plaintiff came into contact with a type of brake shoe containing asbestos that was manufactured by defendant Griffin Wheel Company, Inc. Joined by his

wife, Ora Myrtle Ransford, plaintiff filed a complaint for damages against Griffin in August 2007. The trial court granted Griffin's motion for summary judgment after concluding that "pursuant to the Locomotive Boiler Inspection Act and the Safety Appliances Act, the plaintiffs' causes of action are preempted" by these federal statutes. We affirm.

Notwithstanding its singular noun, the Locomotive Boiler Inspection Act (BIA) is actually a number of statutes passed by Congress that are now collected at title 49 United States Code Sections 20701-20703. The BIA gives the Secretary of Transportation authority over "the condition of every locomotive and tender and its parts and appurtenances." (49 U.S.C. § 20702(a).) There was no dissent when, in 1926, the United States Supreme Court, speaking through Justice Brandeis, held that the BIA "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." (*Napier v. Atlantic Coast Line* (1926) 272 U.S. 605, 611 (*Napier*).) Because Congress intended this power to be federally exclusive, "requirements by the states are precluded, however, commendable or however different their purpose." (*Id.* at p. 613.) In 2000, affirming a decision by this court, our Supreme Court held that the BIA precluded maintenance of state common law damage suits by former railroad workers against a locomotive manufacturer for personal injury allegedly caused by exposure to asbestos in the manufacturer's products. (*Scheiding v. General Motors Corp.* (2000)

22 Cal.4th 471, 474, cert. denied (2000) 531 U.S. 958 (*Scheiding*).)

The Safety Appliances Act (SAA) is also a number of statutes now codified at title 49 United States Code sections 20301-20306. The SAA has grown in scope and now governs "common carriers by railroad engaged in interstate commerce. The Act of 1893 applied only to vehicles used by them in moving interstate traffic. [Citation.] Its requirements were by the Act of 1903 extended to all their vehicles. [Citation.] So far as the safety equipment of such vehicles is concerned, these Acts operate to exclude state regulation, whether consistent, complimentary, additional or otherwise." (*Gilvary v. Cuyahoga Valley Ry.* (1934) 292 U.S. 57, 60-61.) In 1999 our Supreme Court held that the SAA preempted state common law claims for defective design of safety equipment on railway rolling stock. (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1160, cert. denied, *sub. nom.* (2000) 528 U.S.. 1077 (*Carrillo*).)

Brakes on railroad cars clearly qualify under the BIA as an "appurtenant" to those cars, and as "safety equipment" under the SAA.[1] Thus, after *Scheiding*

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[1] We confess to some surprise at plaintiffs' argument that the brake shoes manufactured by Griffin do not qualify as a "safety appliance" within the meaning of the SAA. If the means of stopping thousands of tons of train does not qualify as a safety appliance, we would be hard pressed to imagine what would. Plaintiffs' argument is based on statutory language, in that "The SAA lists specific safety equipment to be used on rail cars, including automatic couplers, secure sill steps, efficient *hand*

(Continued on following page)

and *Carrillo*, this appeal might appear to call for a routine application of the familiar principle of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455: "Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . The decisions of this court are binding upon and must be followed by all the state courts of California." It was so treated last year by Division Four of this district, in a case brought by the same counsel who represent plaintiffs here. That case is *Frastaci v. Vapor Corp.* (2007) 158 Cal.App.4th 1389 (*Frastaci*), which held that state common law tort claims against a locomotive manufacturer alleging that former railroad repairman died of mesothelioma caused by exposure to asbestos in locomotives during

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brakes, secure ladders, running boards, handholds, grab irons, drawbars, and power brakes sufficient to stop the train. (49 U.S.C. § 20302(a).)" Even on this limited front, plaintiffs' argument must fail because the SAA specifies that "enough of the vehicles on the train" must have "power or train brakes so that the engineer on the locomotive . . . can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose." (*Id.* § 20302(a)(5)(A).) Thus, notwithstanding plaintiffs' emphasis on hand brakes, it is clear beyond doubt that Congress intended the SAA to include the major, primary system for controlling train speed. Moreover, plaintiffs pay no attention to the BIA's "appurtenant" language, which would seem more than broad enough to cover brakes that are not hand held. The Secretary of Transportation certainly thought so when promulgating numerous regulations governing railroad brakes, citing the SAA as among the statutes authorizing such regulations. (See 49 C.F.R. §§ 232.1-232.505, 238.1-238.603.)

repair and maintenance are preempted by BIA as interpreted in *Scheiding*. Our Supreme Court denied review.

Despite that, plaintiffs advance a series of novel arguments to avoid that conclusion.

Plaintiffs first assert that "implied field preemption under the SAA and BIA *no longer exists*" because "Congress in 1970 passed a new, comprehensive act to govern *all* areas of railroad safety – including the subcategories that had been governed by the SAA (rail-car appliances) and the BIA (locomotives). This new act, the Federal Railroad Safety Act (FRSA), *expressly* applies to *all railroad-safety areas* – thus including rail-car appliances and locomotives. And the FRSA contains an *express* preemption provision, which preempts *only* those state laws addressing a subject matter on which federal regulations exist."[2]

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[2] The particular language upon which plaintiffs rely – and which we have italicized – is in a provision that currently reads: "A State may adopt or continue in force a law, regulation, or order relating to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters) prescribes a regulation or issues an order covering the subject matter of the State requirement. *A state may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security* when the law, regulation, or order – [¶] (A) is necessary to eliminate or reduce an essentially local safety or security hazard; [¶] (B) is not incompatible with a law, regulation, or order of the United States Government; and [¶] (C) does not unreasonably burden interstate commerce." (49 U.S.C. § 20106(a)(2), italics added.)

(Continued on following page)

"[B]ecause *Carrillo* and *Scheiding* did not consider the effect of the FRSA's express preemption provision, they do not stand for the proposition that former SAA and BIA field preemption still exists despite Congress's express, contrary intent in the FRSA. And thus *Carrillo* and *Scheiding* do not prevent this Court from considering the issue for the first time in California."

To hear plaintiffs frame the issues, one might conclude that the SAA and BIA had been repealed when Congress enacted the FRSA (49 U.S.C. §§ 20106-20167). However, Congress did no such thing, as was expressly noted in *Scheiding*: "[W]hen Congress enacted the Federal Railroad Safety Act in 1970, it specifically identified the BIA [and the SAA] as among the 'particular laws' governing railroad safety that 'have served well,' so well that the Committee on Interstate and Foreign Commerce reviewing the matter 'chose to continue them without change.' (H.R. Rep. No. 91-1194, 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4105.) . . . Additionally, when Congress recodified the BIA in 1994, the House Report stated 'this bill makes no substantive change' and disclaimed any intent to

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Notwithstanding the literal language about a state's "law, regulation or order," it is accepted that federal preemption also extends to state common law tort causes of action. (E.g., *CSX Transp., Inc. v. Easterwood* (1993) 507 U.S. 658, 664; *Scheiding, supra*, 22 Cal.4th 471, 476-477 & fn. 3, 480; *Carrillo, supra*, 20 Cal.4th 1158, 1162.) Plaintiffs do not contend otherwise.

'impair the precedent value of earlier judicial decisions. . . .' (H.R. Rep. No. 103-180, 1st. Sess. (1993) reprinted in 1994 U.S. Code Cong. & Admin. News, p. 822.)"[3] (*Scheiding, supra*, 22 Cal.4th 471, 478.)

Noting the same 1970 committee report, the *Carrillo* court stated: "Because Congress continued

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[3] The 1970 committee report also stated: "The first of the Safety Appliance Acts dates back to 1893 . . . and the Locomotive Inspection Act to 1911. These and other rail safety statutes have been reasonably effective in their respective areas. They were enacted to protect employees against particular hazards and the enforcement of their provisions over the years has saved lives." (H.R. Rep. No. 91-1194, *supra*, reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4106.) At a later point in its report, the committee reiterated its "intent that those existing statutes will continue to be enforced . . . in their respective areas. . . . In other words, it is the intent of the committee that the existing statutes continue to be administered and enforced *as if this legislation had not been enacted*. . . . It is the desire of the committee . . . that the Department [of Transportation] makes its best effort to carry out the new statute *in concert with the existing regulatory framework*." (*Id.* at p. 4114, italics added.) The 1994 "House report" – actually from the Committee on the Judiciary – stated that the purpose of the measure was to "revise, codify, and enact *without substantive change* certain general and permanent laws relating to transportation." (H.R. Rep. No. 103-180, *supra*, reprinted in 1994 U.S. Code Cong. & Admin. News, p. 818, italics added.) In the 648 pages in the United States Code Congressional and Administrative News devoted to the subject of the bill – "Revision of Title 49, U.S.C." – there is only a single brief reference to section 20106, which does not even mention the "clarification" upon which plaintiffs' place so much emphasis. (See *id.* at p. 898.)

The SAA was also recodified in the same 1994 enactment that recodified the BIA. (Pub. Law 103-272 (July 5, 1994) 108 Stat. 745.)

the SAA intact and unmodified within its historic regulatory area, our conclusion as to its preemptive effect is not affected by passage of the FRSA. Since the SAA preempts plaintiff's tort claim, we have no occasion to consider whether the FRSA does also." (*Carrillo, supra*, 20 Cal.4th 1158, 1169, fn. 3.) It is therefore clear beyond any reasonable doubt that both the SAA and the BIA continue to have an existence and potency that is completely independent of the FRSA[4] – a reality recognized by our Supreme Court in *Scheiding* and in *Carrillo*.

Plaintiffs point to two old decisions by the Supreme Courts of Washington and Pennsylvania in support of their contention that the SAA and the BIA were effectively nullified by passage of the FRSA. *State v. Chicago, Milwaukee, St. Paul & Pacific R. Co.* (Wash. 1971) 484 P.2d 1146; *Norfolk & W. Ry. Co. v. Pa. Public Utility* (Pa. 1980) 413 A.2d 1037. Neither case has been followed by any other; indeed, the only reported decision to consider both of these state authorities peremptorily rejected them as marking a

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[4] This conclusion defeats plaintiffs' corollary argument that there is no preemption because there is no specific federal regulation governing asbestos brake shoes on locomotives and rolling stock. On this point we note that the FRSA preemption provision upon which plaintiffs rely prohibits state input if it unreasonably burdens interstate commerce (49 U.S.C. § 20106(a)(2) quoted at fn. 2, *ante*), and our Supreme Court in *Scheiding* endorsed our conclusion that imposing state tort liability for asbestos-related damages would have such a consequence. (*Scheiding, supra*, 22 Cal.4th 471, 476-477.)

sea change in federal policy. (See *Missouri Pacific R. Co. v. Railroad Comm'n of Texas* (5th Cir. 1987) 833 F.2d 570, 576, fn. 7)[5]

Moreover, the Pennsylvania decision cited by plaintiffs was not followed by a Pennsylvania federal district court, a decision affirmed by the United States Supreme Court: *Consol. Rail Corp. v. Pennsylvania Pub. Util.* (E.D.Pa. 1982) 536 F.Supp. 653, affirmed (3d Cir. 1982) 696 F.2d 981, affirmed *sub nom. Pennsylvania Public Utility Commission et al. v. Consolidated Rail Corporation* (1983) 461 U.S. 912 (*Consolidated Rail*).) *Consolidated Rail* was discussed at length in *Scheiding*, the Supreme Court noting that in it the state of Pennsylvania contended that when Congress enacted the FRSA, it "'redistributed railroad regulatory authority so that the total-preemption test of the [BIA] is no longer valid.' [Citation.] The district court rejected the state's argument and found *Napier* controlling." (*Scheiding, supra*, 22 Cal.4th 471, 477.) And, the *Scheiding* court observed, the United States Supreme Court's summary affirmance "'should . . . be understood as . . . applying principles established by prior decisions to the particular facts involved.' [Citation.] We thus have strong, if indirect evidence *Napier* continues to

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[5] Respondent filed a request seeking judicial notice of other decisions from foreign states and other items, which request was opposed in part by appellants. Respondent's request is granted as to items numbered 3, 4, 5, and 6, and denied as to the balance.

control with respect to the scope of BIA preemption." (*Id.* at p. 478.)

Whatever the precise holding of the Pennsylvania district court – a point much discussed at oral argument – the bottom line is that the end result of that litigation has been construed by our Supreme Court, and we are bound by that construction. Thus, whatever persuasive impact the Washington and Pennsylvania state court decisions might otherwise offer – and we can discern none – our own state Supreme Court's contrary decisions in *Carrillo* and *Scheiding* foreclose the issue for us. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d 450, 455.) Plaintiffs' initial argument must be rejected.

Plaintiffs also see significance in the fact that in 2007, after *Carrillo* and *Scheiding*, Congress reenacted the FRSA with the following language added to the preemptive language quoted at footnote 2, *ante*: "Clarification regarding State law causes of action. – (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party –

"(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

"(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

"(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2)." (49 U.S.C. § 20106(b).)

Plaintiffs argue that because this "clarification" involves language not considered in either *Carrillo* or *Scheiding,* we are no longer bound to follow these decisions. But plaintiffs assume a predicate – that the FRSA displaces either the SAA or the BIA – which has already been shown to be inapplicable. To accede to plaintiffs' argument would require us to conclude that Congress intended with this "clarification" to repeal by implication both the SAA and the BIA, something expressly denied. (See fn. 2 and accompanying text, *ante*.)

Plaintiffs see *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51 (*Sprietsma*), as effecting a sea change in federal preemption analysis. We do not. *Sprietsma* involved neither the SAA nor the BIA, but the Federal Boat Safety Act (46 U.S.C. §§ 4301-4311). The United States Supreme Court held that a state tort action was neither expressly nor impliedly preempted by that measure. However, it seems clear that the reason the court acted was to resolve an extensive conflict in lower courts on the preemption issues. (See *Sprietsma, supra,* at p. 55 & fn. 3.) Nothing in the opinion hints at the fundamental shift in preemption

analysis that plaintiffs discern. Moreover, plaintiffs can muster no authority recognizing that such a doctrinal shift occurred. For present purposes, *Sprietsma* is relevant only to the extent the Court held that the "structure and framework" of the federal act "do not convey a 'clear and manifest' intent" to preempt any supplementary efforts by state law. (*Id.* at pp. 69-70.) As already shown, the court concluded otherwise with respect to the SAA and the BIA.

In a similar vein, plaintiffs' argue that in *Terminal Assn. v. Trainmen* (1943) 318 U.S. 1, the United States Supreme Court "pulled back" from its earlier holdings about the preemptive impacts of federal railway laws. Our own Supreme Court rejected a similar argument in *Carrillo, supra*, 20 Cal.4th 1158, 1166. We also think it significant that the United States Supreme Court declined to review either *Carrillo* or *Scheiding*, and that in the more than 50 years after *Terminal Assn.* there is no authority plaintiffs have cited acknowledging the reading they attribute to that decision.[6]

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[6] Subsequent to the filing of their reply brief, plaintiffs advised us by letter that they "inadvertently omit[ted] reference" to *Wyeth v. Levine* (2009) ___ U.S. ___, [129 S.Ct. 1187], but they do not otherwise discuss the relevance or application of *Wyeth* to this appeal. We have examined *Wyeth* – where the United States Supreme Court found that a state tort action for inadequate warning of a drug was not preempted by reason of the Food and Drug Administration's authority over drug labeling – and found nothing which alters our analysis.

Plaintiffs' second argument is that the SAA and the BIA confer immunity only when the train is actually "in use," but not the downtime when it is being repaired or refitted with new brakes. Counsel for plaintiffs candidly acknowledge that this argument was rejected by Division Four when he presented it in *Frastaci*, but he re-presents it in the hope we will reach a different result. Division Four reasoned that "Scant authority discussing the 'in use' limitation vis-à-vis the preemptive scope of the BIA exists. What authority does exist suggests that the 'in use' limitation is immaterial to a BIA preemption analysis." (*Frastaci, supra,* 158 Cal.App.4th 1389, 1399.) After reviewing that authority, the court concluded: "The preemptive scope of the BIA 'extends to the design, the construction and the material of every part of the locomotive and tender and of all its appurtenances.' (*Napier, supra*, 272 U.S. at p. 611.) There is no indication Congress intended the BIA's broad preemptive scope to be circumscribed by the location of the locomotive. Rather, the BIA is directed at the *subject* of the locomotive equipment, which is 'peculiarly one that calls for uniform law. . . .' (*Penna. R.R. Co. v. Pub Service Comm.* (1919) 250 U.S. 566, 569); see also *Napier, supra*, 272 U.S. at p. 612.)" (*Id.* at p. 1402.) We agree with this reasoning.

The summary judgment is affirmed.

Richman, J.

We concur:

Kline, P.J.

Haerle, J.

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IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

ALVA RANSFORD and ORA MYRTLE RANSFORD, Plaintiffs, vs. AC AND S, INC., et al., Defendants.	Case No. CGC-07-274342 **~~[PROPOSED]~~ ORDER GRANTING DEFENDANT GRIFFIN WHEEL COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT [C.C.P. § 437c]** **Date: February 29, 2008** **Time: 9:30 a.m.** **Dept.: 302** **Judge: Hon. Patrick J. Mahoney** **Trial Date: March 10, 2008**

The Motion for Summary Judgment of defendant GRIFFIN WHEEL COMPANY, INC. came on regularly for hearing at the above date and time before this court in Department 302, attorney Stephen Tigerman appearing for plaintiffs ALVA RANSFORD and MYRTLE RANSFORD and attorney Larry Ottaway appearing for defendant GRIFFIN WHEEL COMPANY, INC.

After considering the supporting and opposition papers of both sides and the argument of counsel, the Court ruled that pursuant the Locomotive Boiler Inspection Act and the Safety Appliances Act, the plaintiffs causes of action are preempted. The court granted GRIFFIN WHEEL COMPANY, INC.'s Motion for Summary Judgment.

IT IS HEREBY ORDERED that defendant GRIFFIN WHEEL COMPANY, INC.'s Motion for, Summary Judgment is granted.

Dated: FEB 29 2008

PATRICK J. MAHONEY
JUDGE OF THE
SUPERIOR COURT

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IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

ALVA RANSFORD and ORA MYRTLE RANSFORD, Plaintiffs, vs. AC AND S, INC., et al., Defendants.	Case No. CGC-07-274342 **JUDGMENT BY COURT UNDER C.C.P. § 437c** Date: March 12, 2008 Time: 11:00 a.m. Dept.: 302

This court, having on February 29, 2008, granted the motion for summary judgment by Griffin Wheel Company, Inc., a copy of which is attached as Exhibit "A", and having ordered entry of judgment as requested in said motion.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs ALVA RANSFORD and ORA MYRTLE

RANSFORD shall take nothing, and that defendant GRIFFIN WHEEL COMPANY, INC. shall recover from said plaintiffs costs of suit pursuant to its cost bill.

Dated: MAR 12 2008

PATRICK J. MAHONEY
JUDGE OF THE
SUPERIOR COURT

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 2

ALVA RANSFORD et al.,
Plaintiffs and Appellants,
v.
AC AND S, INC., et al.
Defendants and Respondents.

A121620
San Francisco County No. 274342

(Filed Jul 30, 2009)

BY THE COURT:

Appellants' petition for rehearing is denied.

Date: JUL 30 2009 KLINE, P.J. P.J.

Court of Appeal, First Appellate District,
Division Two – No. A121620

S175613

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ALVA RANSFORD et al.,
Plaintiffs and Appellants,

v.

GRIFFIN WHEEL COMPANY, INC. et al.,
Defendants and Respondents.

(Filed Sep 23, 2009)

The petition for review is denied.

Werdegar, J., was absent and did not participate.

GEORGE
Chief Justice

STATUTES INVOLVED IN THE CASE

The following statutes involved in this case are all from Congress's statutory scheme from railroad safety: United States Codes, Title 49 ("Transportation"), Subtitle V ("Rail Programs"), Part A ("Safety"):

From Chapter 201: "General"

49 U.S.C. § 20101 – "Purpose":

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

49 U.S.C. § 20106 – "Preemption":

(a) *National uniformity of regulation.*

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to

railroad safety or security when the law, regulation, or order

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) *Clarification regarding State law causes of action.*

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) *Jurisdiction.*

Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

From Chapter 203: "Safety Appliances"

49 U.S.C. § 20301 – "Definition and Non-application":

(a) **Definition.** – In this chapter, "vehicle" means a car, locomotive, tender, or similar vehicle.

(b) **Nonapplication.** – This chapter does not apply to the following:

(1) a train of 4-wheel coal cars.

(2) a train of 8-wheel standard logging cars if the height of each car from the top of the rail to the center of the coupling is not more than 25 inches.

(3) a locomotive used in hauling a train referred to in clause (2) of this subsection when the locomotive and cars of the train are used only to transport logs.

(4) a car, locomotive, or train used on a street railway.

49 U.S.C. § 20302 – "General Requirements":

(a) **General.** – Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines –

(1) a vehicle only if it is equipped with –

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if –

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

(b) **Refusal To Receive Vehicles Not Properly Equipped.** – A railroad carrier complying with subsection (a)(5)(A) of this section may refuse to receive from a railroad line of a connecting railroad carrier or a shipper a vehicle that is not equipped with power or train brakes that will work and readily interchange with the power or train brakes in use on the vehicles of the complying railroad carrier.

(c) **Combined Vehicles Loading and Hauling Long Commodities.** – Notwithstanding subsection (a)(1)(B) of this section, when vehicles are combined to load and haul long commodities, only one of the vehicles must have hand brakes during the loading and hauling.

(d) **Authority To Change Requirements.** – The Secretary may –

(1) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety appliances required by subsection (a)(1)(B) and (C) and (2) of this section only for good cause and after providing an opportunity for a full hearing;

(2) amend regulations for installing, inspecting, maintaining, and repairing power and train brakes only for the purpose of achieving safety; and

(3) increase, after an opportunity for a full hearing, the minimum percentage of vehicles in a train that are required by subsection (a)(5)(B) of this section to be equipped and used with power or train brakes.

(e) **Services of Association of American Railroads.** – In carrying out subsection (d)(2) and (3) of this section, the Secretary may use the services of the Association of American Railroads.

49 U.S.C. § 20303 – "Moving Defective and Insecure Vehicles Needing Repairs":

(a) **General.** – A vehicle that is equipped in compliance with this chapter whose equipment becomes defective or insecure nevertheless may be moved when necessary to make repairs, without a penalty being imposed under section 21302 of this title, from the place at which the defect or insecurity was first discovered to the nearest available place at which the repairs can be made –

(1) on the railroad line on which the defect or insecurity was discovered; or

(2) at the option of a connecting railroad carrier, on the railroad line of the connecting carrier, if not farther than the place of repair described in clause (1) of this subsection.

(b) **Use of Chains Instead of Drawbars.** – A vehicle in a revenue train or in association with commercially-used vehicles may be moved under this section with chains instead of drawbars only when the vehicle contains livestock or perishable freight.

(c) **Liability.** – The movement of a vehicle under this section is at the risk only of the railroad carrier doing the moving. This section does not relieve a carrier from liability in a proceeding to recover damages for death or injury of a railroad employee arising from the movement of a vehicle with equipment that is defective, insecure, or not maintained in compliance with this chapter.

49 U.S.C. § 20304 – "Assumption of Risk By Employees":

An employee of a railroad carrier injured by a vehicle or train used in violation of section 20302(a)(1)(A), (2), (4), or (5)(A) of this title does not assume the risk of injury resulting from the violation, even if the employee continues to be employed by the carrier after learning of the violation.

49 U.S.C. § 20305 – "Inspection of Mail Cars":

The Secretary of Transportation shall inspect the construction, adaptability, design, and condition of

mail cars used on railroads in the United States. The Secretary shall make a report on the inspection and submit a copy of the report to the United States Postal Service.

49 U.S.C. § 20306 – "Exemption for Technological Improvements":

(a) **General.** – Subject to subsection (b) of this section, the Secretary of Transportation may exempt from the requirements of this chapter railroad equipment or equipment that will be operated on rails, when those requirements preclude the development or implementation of more efficient railroad transportation equipment or other transportation innovations under existing law.

(b) **Conditions for Exemption.** – The Secretary may grant an exemption under subsection (a) of this section only on the basis of –

(1) findings based on evidence developed at a hearing; or

(2) an agreement between national railroad labor representatives and the developer of the new equipment or technology.

From Chapter 207: "Locomotives"

49 U.S.C. § 20701 – "Requirements for Use":

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when

the locomotive or tender and its parts and appurtenances –

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. § 20702 – "Inspection, Repairs, and Inspection and Repair Reports":

(a) **General.** – The Secretary of Transportation shall –

(1) become familiar, so far as practicable, with the condition of every locomotive and tender and its parts and appurtenances;

(2) inspect every locomotive and tender and its parts and appurtenances as necessary to carry out this chapter, but not necessarily at stated times or at regular intervals; and

(3) ensure that every railroad carrier makes inspections of locomotives and tenders and their parts and appurtenances as required by regulations prescribed by the Secretary and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is used again.

(b) **Noncomplying Locomotives, Tenders, and Parts.** –

(1) When the Secretary finds that a locomotive, tender, or locomotive or tender part or appurtenance owned or operated by a railroad carrier does not comply with this chapter or a regulation prescribed under this chapter, the Secretary shall give the carrier written notice describing any defect resulting in noncompliance. Not later than 5 days after receiving the notice of noncompliance, the carrier may submit a written request for a reinspection. On receiving the request, the Secretary shall provide for the reinspection by an officer or employee of the Department of Transportation who did not make the original inspection. The reinspection shall be made not later than 15 days after the date the Secretary gives the notice of noncompliance.

(2) Immediately after the reinspection is completed, the Secretary shall give written notice to the railroad carrier stating whether the locomotive, tender, part, or appurtenance is in compliance. If the original finding of noncompliance is sustained, the carrier has 30 days after receipt of the notice to file an appeal with the Secretary. If the carrier files an appeal, the Secretary, after providing an opportunity for a proceeding, may revise or set aside the finding of noncompliance.

(3) A locomotive, tender, part, or appurtenance found not in compliance under this subsection may be used only after it is –

(A) repaired to comply with this chapter and regulations prescribed under this chapter; or

(B) found on reinspection or appeal to be in compliance.

(c) **Reports.** – A railroad carrier shall make and keep, in the way the Secretary prescribes by regulation, a report of every –

(1) inspection made under regulations prescribed by the Secretary; and

(2) repair made of a defect disclosed by such an inspection.

(d) **Changes in Inspection Procedures.** – A railroad carrier may change a rule or instruction of the carrier governing the inspection by the carrier of the locomotives and tenders and locomotive and tender parts and appurtenances of the carrier when the Secretary approves a request filed by the carrier to make the change.

49 U.S.C. § 20703 – "Accident Reports and Investigations":

(a) **Accident Reports and Scene Preservation.** – When the failure of a locomotive, tender, or locomotive or tender part or appurtenance results in an accident or incident causing serious personal injury or death, the railroad carrier owning or operating the locomotive or tender –

(1) immediately shall file with the Secretary of Transportation a written statement of the fact of the accident or incident; and

(2) when the locomotive is disabled to the extent it cannot be operated under its own power, shall preserve intact all parts affected by the accident or incident, if possible without interfering with traffic, until an investigation of the accident or incident is completed.

(b) **Investigations.** – The Secretary shall –

(1) investigate each accident and incident reported under subsection (a) of this section;

(2) inspect each part affected by the accident or incident; and

(3) make a complete and detailed report on the cause of the accident or incident,

(c) **Publication and Use of Investigation Reports.** – When the Secretary considers publication to be in the public interest, the Secretary may publish a report of an investigation made under this section, stating the cause of the accident or incident and making appropriate recommendations. No part of a report may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

No. 09-720

SUPREME COURT, U.S.
FILED
JAN 18

In The Supreme Court of the United States

ORA MYRTLE RANSFORD and PATRICIA L. LEE
(as successor-in-interest to ALVA RANSFORD, decedent),

Petitioners,

v.

GRIFFIN WHEEL COMPANY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Two

RESPONDENT GRIFFIN WHEEL COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did the California Court of Appeal, following overwhelming authority from around the country applying this Court's decision in *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926), correctly affirm the trial court's grant of summary judgment in favor of Respondent based on the field preemptive effect of the Locomotive Boiler Inspection Act, 49 U.S.C., Subtitle V, Part A, Ch. 207, §§ 20701, *et seq.* and the Safety Appliance Act, 49 U.S.C., Subtitle V, Part A, Ch. 203, §§ 20301, *et seq.*?

DISCLOSURE STATEMENT PER RULE 29.6

Respondent, Griffin Wheel Company operated as a division of Amsted Industries Incorporated, a privately held Delaware corporation, until October 1, 2008. On that date, Griffin Wheel Company was merged into Amsted Rail Company, Inc., a Delaware corporation, which is a wholly owned subsidiary of Amsted Industries Incorporated. No publicly held company owns 10% or more of stock in either Griffin Wheel Company, Amsted Rail Company, Inc., or Amsted Industries Incorporated.

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JURISDICTION

Petitioners have not cited any proper basis for jurisdiction to review the California Court of Appeal's decision. This case was disposed of properly and pursuant to this Court's long-standing jurisprudence on the field preemptive effect of the Locomotive Boiler Inspection Act, 49 U.S.C., Subtitle V, Part A, Ch. 207, §§ 20701, *et seq.* (the "BIA") and the Safety Appliance Act, 49 U.S.C., Subtitle V, Part A, Ch. 203, §§ 20301, *et seq.* (the "SAA"). Therefore, this case does not invoke any of the bases for jurisdiction of this Court as set forth in 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The Statement of the Case submitted by Petitioners contains misstatements of fact and law that are addressed more fully in the body of this brief. What follows is a concise statement of facts material to consideration of the question presented, pursuant to Sup. Ct. Rule 14.1(g).

Decedent Alva Ransford was employed in the railroad industry from 1950 to 1989 during which time he worked on locomotives and as a supervisor in the locomotive diesel shops and around persons who were working on railcar brake shoes. *See*, Appellants' Appendix on appeal (hereafter "AA") at 80-88.

Respondent, Griffin Wheel Company (incorrectly named in the caption as "Griffin Wheel Company,

Inc.," hereafter "GWC") sold and manufactured railroad brake shoes, which for a time contained a small percentage volume of encapsulated chrysotile asbestos during some of the years that Mr. Ransford worked within the railroad industry. AA at 112-113.

Petitioners filed their complaint in the California Superior Court, City and County of San Francisco, alleging numerous causes of action arising from Mr. Ransford's alleged mesothelioma from exposure to asbestos. GWC answered Petitioners' complaint, generally denying the allegations of the complaint and alleging a number of affirmative defenses including that the claims of the parties were barred by federal field preemption. GWC moved for summary judgment based upon the field preemptive effect of the BIA and SAA (AA at 35-51), and the trial court granted GWC's motion. *See*, Appendix attached to Petition (hereafter "App.") at 15-18.

Contrary to Petitioners' assertion, GWC did not "concede" that the express preemption provision at 49 U.S.C. § 20106 does not also preempt Petitioners' claims. *See*, Petition for Writ of Certiorari (hereafter "Pet.") at 8-9. Nor is it "undisputed" that no federal regulation covers the subject matter of Petitioners' claim – the make-up of train brake shoes. Pet. at 9, n.2. GWC simply did not seek summary judgment on express preemption grounds and only mentioned Section 20106 in order to distinguish its application from the field preemption analysis called for under the voluminous case law interpreting the BIA and SAA. AA at 50:9-26. The trial court granted summary

judgment in favor of GWC based on the federal field preemption under the BIA and SAA and did not decide whether Petitioners' claims were also preempted under the express preemption provision in Section 20106, as that issue was not raised by GWC below. App. at 15-18.

Petitioners appealed the grant of summary judgment and the California Court of Appeal affirmed the trial court's ruling and subsequently denied Petitioners' request for rehearing. App. at 1-14, 19. The Supreme Court of California then denied Petitioners' request for review. App. at 20. Petitioners now seek a writ of certiorari from this Court to review the California Court of Appeal's Opinion.

REASONS TO DENY THE PETITION

I. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT

A. Brief History Of BIA And SAA Field Preemption

Railroads have been "subject to comprehensive federal regulation for nearly a century." *Carrillo v. ACF Industries, Inc.*, 980 P.2d 386, 389 (Cal. 1999) (quoting *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687 (1982)), *cert. denied*, 528 U.S. 1077 (2000). Congress "inten[ds] that railroads should be regulated primarily on a national level through an integrated network of federal law," and has regulated "almost all aspects of the railroad industry, including

rates, safety, labor relations, and worker conditions." *R.J. Corman R. Co. v. Palmore,* 999 F.2d 149, 152 (6th Cir. 1993).

The federal government has specifically regulated the design, maintenance, and safety of locomotives for over a hundred years. In 1893, Congress enacted the first of the Safety Appliance Acts ("SAA"), and in 1911 it followed with the BIA, now known as the Locomotive Inspection Act. The SAA and BIA – enacted with the same Congressional purposes, *Urie v. Thompson*, 337 U.S. 163, 190 (1949) – are now codified, respectively, at 49 U.S.C. §§ 20301-20306 and 20701-20903 (1994).

Over 80 years ago, this Court established the field preemptive effect of the BIA by holding that it "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926). *Napier* further expressly held as follows:

> " . . . **[T]he Boiler Inspection Act, as we construe it, was intended to occupy the field.** The broad scope of the authority conferred upon the Commission[1] leads to

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[1] "Commission" refers to the Interstate Commerce Commission which at the time *Napier* was decided had the controlling authority over the railroads. That authority was transferred to the Department of Transportation in 1966 by the Department of Transportation Act. *See*, *Springston v. Consolidated Rail Corp.*,

(Continued on following page)

> that conclusion. Because the standard set by the Commission must prevail, **requirements by the States are precluded, however commendable or however different their purpose.**"

Napier, 272 U.S. at 613 (emphasis added). Likewise, this Court first established the field preemptive effect of the SAA nearly a century ago in *Southern Ry. Co. v. R.R. Comm., Indiana*, 236 U.S. 439 (1915), which holds as follows:

> "[T]he exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The States thereafter could not legislate so as to require greater or less or different equipment.
>
> * * *
>
> [I]t is sufficient here to say the Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject."

Southern Ry. Co., 236 U.S. at 446-47.

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130 F.3d 241, 244 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998).

In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §§ 20101-20144 (1994). The FRSA is not limited to locomotives and authorizes the Secretary of Transportation to issue supplemental regulations in the area of railroad safety generally. The FRSA contains express preemption and savings clauses that severely restrict the power of states to regulate any aspect of railroad safety. 49 U.S.C. § 20106. The FRSA also explicitly underscores the importance of uniform laws relating to railroad safety: "[l]aws, regulations, and orders related to railroad safety shall be *nationally uniform to* the extent practicable." 49 U.S.C. § 20106 (emphasis added). Significantly, the FRSA purposefully left the BIA "intact, including its preemptive effect." *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152-53 (9th Cir. 1983); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). Thus, the BIA and SAA are part of the comprehensive scheme of federal regulation over locomotive safety and equipment and preempt all state law in those fields, just as they have since this Court definitively determined their preemptive scope in *Napier* and *Southern Ry. Co.* As explained below, these decisions have never been overruled by this Court or any act of Congress, and as such, the broad field preemptive effect of the BIA and SAA remains viable today.

B. Field Preemption Under The BIA And SAA Continues To Exist

Throughout their Petition, Petitioners assert that the BIA and SAA have been repealed by Congress and the need for the field preemption arising from those acts has been impliedly obviated. This premise is based on the faulty reasoning that Congress, by enacting the FRSA and by renumbering Title 49 in 1994, intended to do away with the BIA and SAA and their field preemptive effect. This assumption, however, is belied by the legislative history of these two Congressional actions and the "avalanche" of authority from around the nation upholding field preemption under these statutes.

The Supreme Court of California squarely and explicitly confronted the enactment of the FRSA and the 1994 "re-codification" of Title 49 in relation to the continued vitality of field preemption under the BIA. *Scheiding v. General Motors Corp.*, 993 P.2d 996 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000). Despite Petitioners' insistence that these issues were not raised in *Scheiding*, California's high court clearly examined the applicable legislative history and cited with approval *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (holding that *Napier* and BIA field preemption exist without impairment after enactment of the FRSA). The *Scheiding* opinion succinctly and accurately sets forth the legislative history as follows:

"We also have evidence of legislative intent to this effect. As the court in *Consolidated Rail*, *supra*, 536 F.Supp. at pages 656-657, observed, **when Congress enacted the Federal Railroad Safety Act in 1970, it specifically identified the BIA as among the 'particular laws' governing railroad safety that 'have served well,' so well that the Committee on Interstate and Foreign Commerce reviewing the matter 'chose to continue them without change.'** (H.R. Rep. No. 91-1194, 2nd Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4105.) In discussing the role of the states in this area, the committee noted that '[a]t the present time where the Federal Government has authority [e.g., under the BIA], with respect to rail safety, it preempts the field.' (Id., 1970 U.S. Code Cong. & Admin. News at p. 4108.) **Additionally, when Congress recodified the BIA in 1994, the House report stated 'this bill makes no substantive change' and disclaimed any intent to 'impair the precedent value of earlier judicial decisions. . . .'** (H.R. Rep. No. 103-180, 1st Sess. (1993), reprinted in 1994 U.S. Code Cong. & Admin. News, p. 822; see *Finley v. United States* (1989) 490 U.S. 545, 554-555, 109 S.Ct. 2003, 104 L.Ed. 593.) **In light of this explicit statement, we may 'apply the presumption that Congress was aware of ... earlier judicial interpretations [including *Napier*] and, in effect, adopted them.** [Citations.]' *Keene*

> *Corp. v. United States* (1993) 508 U.S. 200, 212, 113 S.Ct. 2035, 124 L.Ed.2d 118)."

Scheiding, at 1000 (emphasis added). It is clear from this legislative history, as cited in *Scheiding*, that Congress clearly intended to retain the BIA **and** the judicial interpretations which provide its field preemptive effect. Further, Petitioners' claim that the California Supreme Court was not aware of these arguments when it decided *Scheiding* is demonstrably wrong.

The continuing vitality of field preemption under the BIA and SAA is also apparent from express regulations adopted pursuant to the Federal Railroad Safety Act of 1970 ("FRSA"). These regulations completely destroy Petitioners' argument that Congress intended to do away with BIA and SAA field preemption. Title 49 C.F.R. § 232.13(a) reiterates the FRSA's narrow express preemption language, found at 49 U.S.C. § 20106 (which Petitioners cite throughout their Petition as evidence of Congress' intent to wipe out BIA and SAA field preemption). Section 232.13(b), however, goes further as follows, to make clear that **in addition to and as a matter separate from** express preemption under the FRSA:

> Preemption should **also** be considered pursuant to the **Locomotive Boiler Inspection Act** (now codified at 49 U.S.C. 20701-20703), the **Safety Appliance Acts** (now codified at 49 U.S.C. 20301-20304), and the Commerce Clause **based on the relevant**

> **case law pertaining to preemption under those provisions.**

(Emphasis added). The regulation thus expressly clarifies that broad field preemption under the BIA and SAA, and as originally set forth by this Court in *Napier* and *Southern Ry. Co.*, is alive and well despite enactment of the FRSA or the "re-codification" of Title 49. The regulation cannot be read any other way, and its existence cannot be reconciled with Petitioners' position.

Finally, Petitioners' position is directly contrary to an "avalanche" of authority holding that the BIA and SAA must continue to be given a broad field preemptive effect. *Frastaci v. Vapor Corp.*, 158 Cal. App. 4th 1389, 1403 (2007) (stating that its finding of preemption was "consistent with an avalanche of state and federal court decisions holding firm to the Napier principle that the BIA preempts state tort actions"); *In Re West Virginia Asbestos Litigation*, 592 S.E.2d 818, 822 (W. Va. 2003) ("an overwhelming body of case law" persuaded the court that Congress, through the BIA had occupied the field such that the plaintiff's asbestos claims were preempted and that any other decision was "blocked by an avalanche of adverse authority"), *cert. denied sub nom.*, *Abbott v. A-Best Products Company*, 549 U.S. 823 (2006). Support for this proposition is virtually universal. *See, e.g.*, *Scheiding*, *supra* (upholding the BIA's preemptive effect on state law tort claims by railroad workers and their spouses based upon alleged exposure to asbestos-containing products while on the

job and stating, "We conclude *Napier* continues to articulate the preemptive scope of the BIA and thus forecloses state law causes of action . . . "); *Carrillo*, *supra* (holding that the appellants' state law products liability and failure to warn claims were preempted by the SAA); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, *supra* (holding that *Napier* and BIA field preemption exist without impairment after enactment of the Federal Rail Safety Act of 1970); *In Re West Virginia Asbestos Litigation*, *supra*, (holding that state law tort claims against manufacturers of parts of railroad locomotives are preempted by federal law under the BIA); *Springston v. Consolidated Rail Corp*, *supra* (BIA preempted common law negligence claim for failure to install certain safety devices); *Seaman v. A.P. Green Industries, Inc.*, 707 N.Y.S.2d 299 (N.Y. Sup. Ct., 2000) (holding that BIA preempts railroad workers' asbestos personal injury tort claims); *General Motors v. Kilgore*, 853 So.2d 171 (Ala. 2002) (holding that BIA preempts plaintiff's mesothelioma claims grounded in state tort law); *Darby v. A-Best Products Company*, 811 N.E.2d 1117 (Ohio 2004) (holding that BIA preempts railroad workers' state tort claims for asbestos related disease from exposure to defendant's locomotive component parts), *cert. denied*, 543 U.S. 1146 (2005); *Forrester v. American Dieselectric, Inc.*, 255 F.3d 1205, 1210 (9th Cir. 1999) ("We think first that the force of the sweeping preemption rule under Napier remains unimpaired."); *Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997) (holding that the BIA preempts state common law remedies against

railroad manufacturers for injuries allegedly caused by design defects in trains); *Oglesby v. Delaware & Hudson Railway Co.*, 180 F.3d 458 (2d Cir. 1999) (holding that the BIA preempts common law remedies relating to locomotive equipment safety, including product defect and failure to warn claims), *cert. denied*, 528 U.S. 1004 (1999); *Missouri Pacific R. Co. v. Railroad Comm'n of Texas,* 833 F.2d 570 (5th Cir. 1987); *United Transp. Union v. Foster,* 205 F.3d 851, 860-61 (5th Cir. 2000); *First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983); *King v. Southern Pacific Transp. Co.*, 855 F.2d 1485, 1489 n.2 (10th Cir. 1988); *Norfolk Southern Ry. Co. v. Denson*, 774 So.2d 549, 553-555 (Ala. 2000); *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, 410 S.E.2d 437, *cert. denied*, 200 Ga. App. 895 (1991); *Key v. Norfolk Southern Ry. Co.*, 228 Ga. App. 305, 491 S.E.2d 511 (1997); *In re Train Collision at Gary, Indiana,* 670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom., Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind.), *cert. denied sub nom., Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997); *Furlong v. Union Pacific R. Co.*, 766 So.2d 751, 761-62 (La. App. 2000), *writ denied*, 781 So.2d 556 (2001); *see also*, *Pennsylvania Ry. Co. v. Pub. Service Comm'n*, 250 U.S. 566, 569 (1919) (via the SAA, the United States has exercised its exclusive power in the field, and thus "the states no more can supplement its requirements than they can annul them"); *Davis v. Manry*, 266 U.S. 401 (1925)

(reaffirming SAA field preemption); *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57, 60-61 (1934) ("So far as the safety equipment of such vehicles is concerned, [the Safety Appliance Act] operates to exclude state regulation whether consistent, complementary, additional or otherwise.").

Thus, the California Court of Appeal's Opinion is not in conflict with the decisions of this Court, but rather it is in accord with this Court's stance on BIA and SAA field preemption as first set forth in *Napier* and *Southern Ry. Co.* Moreover, the Opinion below is in line with the legislative history of the very Congressional acts upon which Petitioners rely, the applicable federal regulatory scheme, and essentially unanimous authority from around the country upholding BIA and SAA field preemption. As such, review is not warranted, and the Petition should be denied.

C. The Correct Preemption Analysis Was Applied Below

The United States Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2 quoted in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Federal law preempts state law where (1) the state law conflicts with federal law or compliance with both state and federal law is impossible; (2) Congress has legislated comprehensively,

thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; (3) federal law expressly preempts the state law; or (4) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress or interferes with the methods by which the federal statute was designed to reach Congress's goal. *See*, *Louisiana Pub. Serv. Comm'n v. Fed. Communications Comm'n*, 476 U.S. 355, 368-369 (1986); *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 103 (1992); *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Petitioners assert that the decision below was contrary to this Court's decisions on federal preemption analysis. Pet. 14-16. In support of their assertion, Petitioners cite to an opinion by this Court which states, "***If the statute contains an express preemption clause***, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S. Ct. 1732 (1993) (emphasis added). The BIA and SAA do not contain express preemption clauses. As discussed above, those two statutes have long been interpreted as preempting the fields of locomotive parts and train safety appliances. Thus, the express preemption analysis that Petitioners argue should be applied here is inapposite.

Petitioners also assert that the California Court of Appeal failed to apply a presumption against

preemption. Such a presumption, however, is inapplicable when field preemption is at issue. Field preemption analysis is the reverse of express preemption analysis. This Court has unequivocally held that "an 'assumption' of non-pre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *U.S. v. Locke*, 529 U.S. 89, 108 (2000) (discussing national and international maritime commerce). Here, as in *Locke*, "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id.*; *see also*, *Carrillo v. ACF Industries, Inc.*, 20 Cal.4th 1158, 980 P.2d 386, (Cal. 1999), *cert. denied*, 528 U.S. 1077 (2000). Therefore, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108. Further, in field preemption analysis a federal determination that regulation is unwarranted preempts state law even in the absence of an express regulation. As this Court held in *Napier*, 272 U.S. at 613, "the fact the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power."

In support of their position on preemption analysis, Petitioners cite to this Court's recent decision in *Wyeth v. Levine*, ___ U.S. ___, 129 S. Ct. 1187 (2009). That case, however, has no application here. *Wyeth* presented only the question of whether the Food and Drug Administration's drug labeling

decisions preempt state law products liability claims premised on a theory that different labeling was necessary. *Wyeth* was a **conflict** preemption case, *i.e.*, that the jury's determination of the necessary labeling requirements conflicted with the determination made by the FDA. Here, however, Petitioners' claims are barred by **field** preemption – a concept that was not even discussed by this Court in *Wyeth* because that defense had been abandoned. *Wyeth* at 1192 ("The (trial) court found no merit in . . . Wyeth's field pre-emption argument, which it has since abandoned").

Here, Congress and its commission (the FRA) have clearly exercised their exclusive jurisdiction over railroad equipment design through the BIA and SAA. As the courts below correctly ruled, the effect of these statutes is preemption of the field, which bars Petitioners' claims here. The conflict preemption reasoning in *Wyeth* and the express preemption reasoning in *CSX Transportation* are inapplicable in this case, and they do not change the appropriate field preemption analysis. Thus, the California Court of Appeal's opinion in this case does not conflict with the decisions of this Court, and the Petition should be denied.

II. THERE IS NO CONFLICT AMONG THE STATES AND CIRCUITS - THE ISSUE IS SETTLED

A. Four State Supreme Courts And Five Federal Circuit Courts Have Upheld BIA And SAA Field Preemption

Petitioners assert that only two federal circuits and two state supreme courts have ruled in favor of field preemption under the BIA and SAA. Pet. at 23. This is simply not accurate. Four state supreme courts have issued opinions directly contrary to Petitioners' arguments here: **(1) California** – *Scheiding v. General Motors Corp.*, 993 P.2d 996 (Cal. 2000), *cert. denied*, 531 U.S. 958, 121 S. Ct. 383 (2000), and *Carrillo v. ACF Industries, Inc.*, 980 P.2d 386 (Cal. 1999), *cert. denied*, 528 U.S. 1077 (2000); **(2) Alabama** – *General Motors v. Kilgore*, 853 So.2d 171 (Ala. 2002); **(3) Ohio** – *Darby v. A-Best Products Company*, 811 N.E.2d 1117 (Ohio 2004), *cert. denied*, 543 U.S. 1146 (2005); and **(4) West Virginia** – *In Re West Virginia Asbestos Litigation*, 592 S.E.2d 818 (W. Va. 2003), *cert. denied sub nom., Abbott v. A-Best Products Company*, 549 U.S. 823 (2006). These four states are joined by five federal circuits to hold the same: **(1) Second** – *Oglesby v. Delaware & Hudson Railway Co.*, 180 F.3d 458 (2d Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999); **(2) Fifth** – *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987); *United Transp. Union v. Foster*, 205 F.3d 851, 860-861 (5th Cir. 2000); **(3) Sixth** – *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir.

1997), *cert. denied*, 523 U.S. 1094 (1998); **(4) Eighth** – *First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998); and **(5) Ninth** – *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983); *Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997); *Forrester v. American Dieselectric, Inc.*, 255 F.3d 1205, 1210 (9th Cir. 1999). The field preemptive effect of the BIA and SAA was also upheld by the federal district court in *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982). As discussed below, that decision was summarily affirmed by the Third Circuit, *Consolidated Rail*, 696 F.2d 981 (3d Cir. 1982), as well as this Court, *Consolidated Rail*, 461 U.S. 912 (1983). Moreover, the two "conflicting" decisions cited by Petitioners are no longer controlling, misconstrued, and contrary to the great weight of authority, as discussed below.

B. *Norfolk & Western Ry. Co. v. Pennsylvania Public Utility Comm'n* Has Been Impliedly Overruled By This Court

Petitioners rely heavily on the Pennsylvania Supreme Court's decision in *Norfolk & Western Ry. Co. v. Pennsylvania Public Utility Comm'n*, 413 A.2d 1037 (Pa. 1980). However, this case has been impliedly overruled. Two years after it was decided, the Federal District Court for the Eastern District of Pennsylvania decided *Consolidated Rail*, *supra*, and

dealt expressly, and disagreed, with the earlier decided *Norfolk & Western* case:

> I, however, disagree with the states' argument (relying on *Norfolk & Western*) for two reasons. First, the legislative history of the Railroad Safety Act shows that Congress intended no change to the Locomotive Inspection Act. Second, elimination of the total-preemption test for locomotive equipment runs contrary to the purpose of the Railroad Safety Act.
>
> In passing the Railroad Safety Act, Congress could have repealed the Locomotive Inspection Act, or recodified or subsumed it within the comprehensive Railroad Safety Act. Instead, Congress concluded that the Locomotive Inspection Act was working well, and specifically determined to keep it independently in force "without change." These decisions negate implied modification of any part of the Locomotive Inspection Act, including its total occupation of the locomotive-equipment field.

Consolidated Rail, 536 F. Supp. at 656. The federal district court's decision in *Consolidated Rail* was appealed to this Court, was summarily affirmed, and thereby became the law of the land. The decision was first affirmed by the Third Circuit Court of Appeals. *Consolidated Rail*, 696 F.2d 981 (3d Cir. 1982). This Court then granted certiorari and likewise summarily affirmed. *Consolidated Rail*, 461 U.S. 912 (1983). The summary affirmance by the U.S. Supreme Court

constitutes binding precedent on all lower courts, state and federal. *Hicks v. Miranda*, 422 U.S. 332, 344-345 (1975) ("lower courts are bound by summary decisions by this Court until such time as the Court informs them that they are not"); *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 53 L.Ed.2d 199 (1977) (Summary affirmance "should . . . be understood as . . . applying principles established by prior decisions to the particular facts involved."). Indeed, the Pennsylvania Supreme Court recognizes that "the decisions of the United States Supreme Court interpreting federal statutes are binding on this Court." *Krentz v. Consolidated Rail Corp.*, 910 A.2d 20, 33, n.15 (Pa. 2006); *see also*, *Purple Orchid, Inc. v. Pa. State Police*, 813 A.2d 801, 806 (Pa. 2002). There is simply no question but that the issue of the field preemptive effect to be given the BIA and SAA, clearly federal statutes, by reason of the Supremacy Clause of the U.S. Constitution is one of federal law. Thus, *Consolidated Rail* impliedly overruled *Norfolk & Western* on the very grounds for which Petitioners cite it.[2]

The validity of *Norfolk & Western* is being questioned in two pending Pennsylvania state court cases. *See*, *Harris v. A.W. Chesterton, Inc., et al.*, No. 000783, Ct. of Common Pleas, Philadelphia County,

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[2] Petitioners claim that there is more than one ground for affirmance in *Consolidated Rail*. Pet. at 31, n.6. However, the district court's opinion clearly rests upon the proposition that BIA and SAA field preemption survive the enaction of the FRSA.

Civil Div., July Term 2005; and *Atwell v. John Crane, Inc.*, No. 1366, Ct. of Common Pleas, Philadelphia County, Civil Div., May Term 2004. *Harris* is currently on appeal and awaiting decision in the Superior Court of Pennsylvania. *See, Harris v. A.W. Chesterton, Inc., et al.*, No. 3505 EDA 2008 (Pa. Super.). *Atwell* was recently decided by the Superior Court of Pennsylvania, *see, Atwell v. John Crane, Inc.*, ___ A.2d ___, 2009 WL 4844374 (Pa. Super.), 2009 Pa. Super. 246 (Dec. 17, 2009), and a request for review by the Supreme Court of Pennsylvania is forthcoming. The final decisions in those cases may well recognize the downfall of *Norfolk & Western* and/or **expressly** overrule it. Indeed, the Superior Court of Pennsylvania in *Atwell* expressly encourages its Supreme Court to revisit the issue. *Atwell*, at *5, n.9 ("The decision as to whether the legal rights and remedies related to railroad workshops are or are not preempted resides more appropriately in our Supreme Court to whose attention we strongly recommend it."). An appeal is also pending before the Third Circuit Court of Appeals in an asbestos case in which summary judgment was granted on BIA/SAA field preemption grounds. *See, Kurns v. A.W. Chesterton, et al.*, Slip Copy, 2009 WL 249769 (E.D. Pa.). The Third Circuit's decision in *Kurns* will likely solidify its earlier summary affirmance of *Consolidated Rail* and clarify that decision's effect on *Norfolk & Western*. Therefore, review by this Court is premature, as the Pennsylvania appellate courts and/or the Third Circuit Court of Appeals may well eliminate any argument

that *Norfolk & Western* creates a conflict among the decisions of the states and/or federal circuits.

C. *State v. Chicago, Milwaukee, St. Paul & Pacific R. Co.* Is Not A BIA/SAA Field Preemption Case At All

Petitioners also claim that *State v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 484 P.2d 1146 (Wash. 1971), supports their position. It does not. In *Chicago Milwaukee*, a railroad company was convicted of violating a state criminal statute requiring trains operating in proximity to brush or grass to be equipped with spark arresters. On appeal, the railroad company argued that the state statute was preempted by the BIA. The prosecution, in turn, argued that the BIA was designed to protect the safety of persons, not property and that preemption was not viable where the Interstate Commerce Commission had yet to regulate specifically as to a part or appurtenance of a locomotive. *Chicago Milwaukee*, 484 P.2d at 1148.

The Court, in holding against preemption, rested its decision largely on the fact that "states, in the exercise of their police power, may prescribe regulations applicable to interstate commerce for the protection of their citizens' property." *Id.* at 1149 (emphasis added). Such reasoning makes clear that despite its passing reference to the BIA and SAA, *Chicago Milwaukee* was decided using express preemption analysis under the FRSA. This is evident because of

the Court's reliance on the fact that preventing forest fires is an "essentially local safety hazard." This reasoning is taken directly from the language of FRSA and its narrow express preemption clause, and is irrelevant to the BIA and SAA's broad field preemption. Indeed, *Chicago Milwaukee* has been expressly treated as an FRSA case. *See, e.g., Atchison, Topeka and Santa Fe Railway Co. v. Illinois Commerce Comm'n*, 453 F. Supp. 920, 926 (N.D. Ill. 1977) (explaining that in *Chicago Milwaukee*, "the Supreme Court of Washington found that the state's regulation concerning fires alongside railroad tracks was not preempted **by the Railroad Safety Act**." (emphasis added)).

Chicago Milwaukee, despite its confusing references to the BIA, was clearly decided as an express preemption case under FRSA and cannot be legitimately read as a BIA preemption case. Thus, the FRSA express preemption analysis set forth in *Chicago Milwaukee* has no bearing on the issues before this Court. In any event, to the extent *Chicago Milwaukee* addresses the BIA, it is no longer viable precedent at all, as it too was decided before *Consolidated Rail*, *supra*. It is therefore no surprise that both *Norfolk & Western* and *Chicago Milwaukee* have been described as "unpersuasive and contrary to federal policy." *Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas*, 833 F.2d 570, 576, n.7 (5th Cir. 1987).

In light of the above, Petitioners' argument that certiorari review is justified because the decision

below by the California Court of Appeal conflicts with *Norfolk & Western* and *Chicago Milwaukee* is without merit. This Court granted certiorari in and summarily affirmed *Consolidated Rail* in 1983, years **after** *Norfolk & Western* and *Chicago Milwaukee* were decided. The decision below was not from California's highest court, unlike *Scheiding* and *Carrillo* which were. This Court denied certiorari in both *Scheiding* and *Carrillo* **after** *Norfolk & Western* and *Chicago Milwaukee* were decided. *See*, *Scheiding*, 993 P.2d 996 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000); and *Carrillo*, 980 P.2d 386 (Cal. 1999), *cert. denied*, 528 U.S. 1077 (2000). In fact, **after** *Norfolk & Western* and *Chicago Milwaukee*, this Court denied certiorari on this issue five more times. *See*, *In Re West Virginia Asbestos Litigation*, 592 S.E.2d 818 (W. Va. 2003), *cert. denied sub nom.*, *Abbott v. A-Best Products Company*, 549 U.S. 823 (2006); *Darby v. A-Best Products Company*, 811 N.E.2d 1117 (Ohio 2004), *cert. denied*, 543 U.S. 1146 (2005); *Oglesby v. Delaware & Hudson Railway Co.*, 180 F.3d 458 (2d Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999); *In Re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom., Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind.), *cert. denied sub nom., Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). In addition to being after *Norfolk & Western* and *Chicago Milwaukee*, each of the cases in which

this Court denied certiorari were **after** the 1994 "re-codification" upon which Petitioners rely. The time to review the issue via certiorari on the grounds that conflicting decisions exist will arise only if the Pennsylvania Supreme Court reaffirms its holding in *Norfolk & Western*.

By denying certiorari in the above-cited cases, this Court has rejected the opportunity to revisit the scope of the BIA/SAA seven times in the last twelve years. Undoubtedly, the Court has exercised its "judicial discretion" to deny such review precisely because federal law in this area was settled long ago by *Napier* and *Southern Ry. Co. See*, Sup. Ct. Rule 10, "Considerations Governing Review on Certiorari."

Nothing has changed since this Court denied the petitions for writ of certiorari in each of those cases. Instead, as discussed above, an even greater litany of cases has now agreed that Petitioners' claims fall within the field preempted by the BIA and SAA. Accordingly, as this Court found in *Napier* and *Southern Ry. Co.* nearly a century ago, the BIA and SAA preempt the entire field of locomotive equipment, design, construction, materials, parts and appurtenances, as well as the field of train safety appliances. Therefore, this Petition should be denied.

III. FIELD PREEMPTION UNDER THE BIA AND SAA DOES NOT UNDERMINE RAILROAD SAFETY

Petitioners assert that the field preemptive effect given the BIA and SAA undermines railroad safety, and that citizens may be left without recourse if this preemption is upheld. However, as the California Supreme Court clearly explained in *Scheiding*, the BIA actually broadens the opportunity for recovery under FELA, which provides ample recourse for railroad employees:

> [L]ike the Safety Appliance Acts at issue in *Carrillo,* the BIA "contains no evidence Congress assumed or intended state remedies for design defects would be preserved. Given the goal of national uniformity, allowing such claims would substantially impair its function."
>
> Drawing on *Medtronic* and *Silkwood*, the Court of Appeal in *Viad*, reached a contrary conclusion by defining the field preempted by the BIA to exclude plaintiffs' state tort actions. It noted that "when the BIA was enacted, a railroad employee would have had no right of action against the manufacturer." The court reasoned that since "[t]he doctrine of strict liability of a manufacturer was not established until much later", Congress could not have intended to preempt such actions. But this reasoning proves too much: Equally logically, Congress could not have intended to preserve that which did not exist.

> Furthermore, the BIA was enacted as an amendment to the Federal Employers' Liability Act (45 U.S.C. § 51 et seq., FELA), which significantly expanded the ability of railroad workers to seek recourse for on-the-job injuries and has been broadly interpreted. ("One of the primary purposes of FELA was to eliminate defenses to tort liability and to facilitate recovery. [Citation.]".) Having enlarged the basis for recovery under federal law, Congress reasonably could have intended to restrict it under state law.
>
> Moreover, unlike the situation in *Silkwood,* the field occupied by the BIA must necessarily extend to state law tort recovery. That is, the BIA cannot remove "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances" from the purview of state regulation without concomitantly precluding tort actions premised on a defect in such design, construction, or material. Any other result would place regulation of these requirements in the hands of state juries, thereby constraining the Secretary of Transportation's regulatory authority and undermining the goal of uniformity.

Scheiding, 993 P.2d at 1001-1002 (citations omitted); *see also*, *Carrillo*, 980 P.2d 392-93.

Petitioners even go a step further and claim that field preemption under these acts "actually encourages manufacturers to market defective products."

Pet. at 33. Such an assertion is completely without merit. As the Ninth Circuit states in *Law*, the "distinction [between manufacturers and railroads] . . . is without significance" because "[i]mposing tort liability on railroad equipment manufacturers" would force them to conform to state standards, thereby "transfer[ring] the regulatory locus from the Secretary of Transportation to the state courts – a result the BIA was clearly intended to foreclose." 114 F.3d at 911-912. *Accord, Springston*, 130 F.3d at 244-245 (defect claim against manufacturer preempted); *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (same).

Preemption depends on whether a claim is within the preempted field, not on who the defendant is. *Taylor AG Ind. v. Pure-Gro*, 54 F.3d, 555, 562 (9th Cir. 1995) ("Under *Cipollone*, the analysis focuses not on whom the legal duty is imposed, but on whether the legal duty constitutes a state law requirement . . . "). Thus, it is *what* is regulated, not *who* is regulated, that matters. What is regulated here is "the design, the construction, and the material" of locomotive "part[s]" and "appurtenances." *Napier,* 272 U.S. at 611. Since Petitioner's claims fall within the field, they are preempted. *Accord, Law*, 114 F.3d at 911-912.

The BIA covers manufacturers. Any "manufacturer . . . of railroad equipment" who violates or causes the violation of "any requirement of . . . the Locomotive Inspection Act" is subject to penalties. 49 C.F.R. §§ 229.7(b), 230.0. Accordingly, if a locomotive manufacturer violates applicable provisions of the BIA or FRSA or their regulations, its conduct is

clearly within the enforcement reach of the Secretary of Transportation, and it would be subject to substantial civil penalties under § 21302. Further, the Secretary of Transportation has the exclusive discretion to determine who is subject to its regulations and to enforce them accordingly. *Id.*

Even if the penalty provisions were not directly applicable to manufacturers, the "realities of the business world" are that "[b]ecause railroad operators are liable for any injuries suffered by their employees, they would not buy locomotives, cars and other equipment that fall short of the BIA standards." Doing so not only would risk FELA damage awards, but would subject railroad operators to daily fines of up to $20,000 for every violation. Thus, "[l]ocomotive manufacturers already have every incentive to comply with federal standards." *Law*, 114 F.3d at 912.[3]

Moreover, because the preemptive field, namely the "design, the construction, and the material of every part of the locomotive," is "in the hands of a manufacturer," Congress's intent to preempt that field "would be accomplished best by including the manufacturer within the statute's coverage." *Oglesby*,

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[3] *Cf.*, *Asahi Metal Indust. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (subjecting supplier of tire components to state court jurisdictions would "undoubtedly create an additional deterrent to the manufacture of unsafe component" but is unnecessary because "similar pressures will be placed on [the supplier] by [its] purchasers . . . ").

180 F.3d at 462; *Law*, 114 F.3d at 911-912. Finally, it would make no sense, and defeat Congress's purpose, if claims respecting locomotive parts were preempted as to the railroad that buys them but not as to the manufacturer that sells them. Congress intended that "railroads should be regulated primarily on a national level through an integrated network of federal law." *R.J. Corman R. Co. v. Palmore*, 999 F.2d at 152. The "uniform national regulation" of locomotive equipment is a centerpiece of Congress's plan, and is designed to avoid subjecting locomotives to non-uniform standards from one state to the next. *Law*, 114 F.3d at 910.

"Apart from compensating victims of accidents for their injuries, the purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. . . . " *Id.* at 910-911. The goal of the BIA and SAA is to prevent the paralyzing effect on railroads from patchwork requirements by each state concerning safety devises on locomotives crossing state lines. To facilitate this goal, the BIA and SAA applies to manufacturers of locomotives and their component parts, train safety appliances, as well as to railroad carriers. Petitioners' state tort claims concern the design, construction, and material of the locomotive, its parts and appurtenances, and train safety appliances. As such, those claims are preempted, and this Petition should be denied.

CONCLUSION

Based on the above arguments and authorities, Respondent, Griffin Wheel Company respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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In The
Supreme Court of the United States

ORA MYRTLE RANSFORD and PATRICIA L. LEE
(as successor-in-interest to ALVA RANSFORD, decedent),

Petitioners,

v.

GRIFFIN WHEEL COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Two

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INTRODUCTION

Petitioners' certiorari petition posits a simple question: What is the pre-emptive effect of Congress' *statutory* scheme governing railroad safety?

Without question, pre-emption arises only when it is Congress' "clear and manifest" intent, which is found first in Congress' express statutory provisions. *See Wyeth v. Levine* ___ U.S. ___, 129 S.Ct. 1187, 1194-1195 (2009); *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732 (1993). And for railroad safety, Congress has created *one* statutory scheme – Title 49, Subtitle V ("Rail Programs"), Part A ("Safety") – with an *express* declaration of pre-emptive intent for all laws "related to railroad safety." 49 U.S.C. § 20106, subd. (a)(2) (App. 21-22).

Thus, determining Congress' intent for pre-emption of railroad-safety laws would seem to require analysis of Congress' express provision.

But respondent Griffin wants this Court to look for pre-emption everywhere *but* the governing statute. Griffin's opposition brief ("Opp.") *never* addresses Congress' provision, let alone explains how it somehow does not govern all laws "related to railroad safety." Nevertheless, Griffin insists that, in addition to narrow express pre-emption that encourages state participation, there exists simultaneously an implied scheme of universal "field" pre-emption that broadly *bars* all state regulation – pre-emption supposedly to be found:

- In former statutory "acts" (the SAA and BIA) that predated Congress' express pre-emption provision and that no longer exist as discrete "acts," having been largely repealed, with only a few former provisions merged *into* Congress' modern railroad-safety scheme. *See* Opp. at 3-6.

- In "legislative history" that not only does not show congressional intent to pre-empt the "field" but in fact shows a contrary intent to involve the states in regulating railroad safety. *See* Opp. at 7-9.

- In a supposed "avalanche" of case law that, in truth, does not even *address* whether Congress' expression of its pre-emptive intent obviated any earlier interpretation of implied field pre-emption, instead *assuming* that field pre-emption still exists and ruling only on its *scope*. *See* Opp. at 10-13, 17-18.

- And in a recently enacted federal "regulation" that, by definition, does not reflect *Congress'* intent and that lacks any persuasive value. *See* Opp. at 9-10.

None of these trumpeted sources of a broad pre-emptive intent suffices to negate Congress' *express* declaration of a much narrower intent. Thus, broad field pre-emption is not Congress' "clear and manifest" intent.

This Court should grant certiorari.

I. THE SAA AND BIA NO LONGER EXIST, LET ALONE IMPLY A PRE-EMPTIVE INTENT CONTRARY TO CONGRESS' EXPRESS INTENT.

Griffin first asserts that field pre-emption is still implied by the former SAA and BIA, which (according to Griffin) "are now codified" at "49 U.S.C. §§ 20301-20306 and 20701-20[703]." Opp. at 4.

But the acts formerly known as the "SAA" and the "BIA" no longer exist. *See* Petition at 22. In 1994, Congress repealed those former acts' 29 provisions (formerly 45 U.S.C. §§ 1-16 and 22-34), discarded 20, and moved the remaining nine into its comprehensive scheme for railroad "Safety" (now 49 U.S.C. §§ 20301-20306 and 20701-20703). *See* Petition at 22.

Thus, Griffin is wrong to trumpet judicial interpretations of those *former* acts as once impliedly occupying and pre-empting "the field." Opp. at 4-5. Those acts as passed, with their numerous provisions, may once have reasonably been interpreted as occupying the field and thus pre-empting all state regulations. But because those acts' provisions have been decimated, the "acts" themselves no longer exist, and any interpretation of the full former acts no longer applies.

Moreover, even if Congress had kept all the former SAA and BIA provisions, finding that those provisions still implied Congress' intent to apply broad field pre-emption would be improper. Once Congress declared its pre-emptive intent for all laws

"related to railroad safety," gleaning a different "implied" intent became neither necessary nor tenable. *See* Petition at 16-18.

II. THE CITED "AVALANCHE" OF AUTHORITY DOES NOT ADDRESS THE ISSUE PRESENTED HERE.

Next, Griffin claims that an "'avalanche' of authority hold[s] that the BIA and SAA must continue to be given a broad field preemptive effect." Opp. at 10.

But no such "avalanche" exists. Most of Griffin's cited cases do not even *address* the issue presented here: whether Congress' expression of its pre-emptive intent obviated any interpretation that field pre-emption was "implied" in the SAA and BIA. Instead, those cases *assume* that field pre-emption still exists and rule only on its *scope* – *e.g.*, whether it extends to specific regulations or to state tort claims.

Petitioners have cited this Court to the only published decisions they can find that specifically find whether Congress' express provision for narrow pre-emption obviated any implied field pre-emption. *See* Petition at 23-24 (*citing Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983);[1]

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[1] We note that the Ninth Circuit in *Law v. General Motors Corp* , 114 F.3d 908, 913 n 4 (9th Cir 1997), cited *Marshall* (also Ninth Circuit) for the proposition that "the FRSA has no effect on the BIA's preemptive scope." The petition cites only *Marshall*

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Springston v. Consolidated Rail Corp., 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094, 118 S.Ct. 1560 (1997); *General Motors Corp. v. Kilgore*, 853 So.2d 171, 179 (Ala. 2002)); Petition at 26 (*citing Consolidated Rail Corp. v. Pennsylvania P.U.C.*, 536 F.Supp. 653 (E.D. Pa. 1982), *summarily aff'd*, 696 F.2d 981 (3d Cir. 1982), *summarily aff'd sub nom. Pennsylvania P.U.C. v. Consolidated Rail Corp.*, 461 U.S. 912 (1983)); Petition at 10-11 (*citing Scheiding v. General Motors Co.*, 993 P.2d 996, 22 Cal.4th 471 (Cal. 2000), *cert. denied*, 531 U.S. 958, 121 S.Ct. 383 (2000); *Carrillo v. ACF Indus., Inc.*, 980 P.2d 386, 20 Cal.4th 1158 (Cal. 1999), *cert. denied*, 528 U.S. 1077, 120 S.Ct. 793 (2000)).

Although Griffin cites numerous other cases applying field pre-emption (Opp. at 10-13), *none* considers the issue raised here, let alone holds that field pre-emption survives despite Congress' express contrary intent.

That is the root of the problem here. For years, most plaintiffs fighting pre-emption of their railroad-safety claims have argued only that "field" pre-emption is not broad enough to bar their claims but not that it simply no longer exists. Thus, defendants have amassed an "avalanche" of authority *imposing* SAA/BIA field pre-emption – but little authority

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(and not *Law*) to show that the nationwide conflict includes the Ninth Circuit *See* Petition at 23

actually holding that such field pre-emption still exists despite Congress' contrary express intent.

III. LEGISLATIVE HISTORY CANNOT OVERCOME CONGRESS' EXPRESS INTENT – AND IT SUPPORTS PETITIONERS.

Next, Griffin contends that "legislative history" shows that Congress, in stating its narrow pre-emptive intent, nevertheless did not "inten[d] to do away with" broad field pre-emption. Opp. at 7.

But Griffin is wrong. When Congress has stated its pre-emptive intent *expressly* in the governing statutory scheme, a contrary intent cannot be "implied" in legislative history or anywhere else. *See English,* 496 U.S. at 78-79; *CSX Transportation*, 507 U.S. at 664.

Moreover, the cited legislative history supports petitioners. Griffin cites the House report reprinted at 1970 United States Code Cong. and Admin. News ("U.S.C.C.A.N.") at 4104 ("House Report"). Opp. at 8. But Griffin fails to acknowledge that this House Report is part of the record below (*see* AA 836-862) and is discussed at length in the petition (at pp. 19-21, 27-29). Nor does Griffin address petitioners' showing that the House Report corroborates that Congress, in enacting its comprehensive railroad-safety scheme and pre-emption provision, intended specifically to *involve* the states in regulating railroad safety – a result irreconcilable with continuing to apply broad field pre-emption barring any state regulation.

Instead, Griffin cites a sliver of the House Report that was discussed in the federal district court's decision in *Consolidated Rail*, 536 F.Supp. at 653. Opp. at 8. But Griffin again ignores the petition, which shows that the district court misconstrued the House Report excerpt that it cited and ignored the balance of the Report contradicting its analysis. *See* Petition at 27-30.

In any case, even if the cited excerpt suggested that field pre-emption be retained, at most it would conflict with the balance of the House Report – and it certainly would not establish Congress' "clear and manifest" intent to retain field pre-emption. *Wyeth*, 129 S.Ct. at 1194-1195.

IV. THE CITED REGULATION DOES NOT REFLECT *CONGRESS'* INTENT.

Next, Griffin asserts that field pre-emption must still exist because a recently enacted federal regulation (49 C.F.R. § 232.13) suggests that courts "conside[r]" both express pre-emption *and* field pre-emption "pursuant to" the BIA and SAA.[2] Opp. at 9-10.

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[2] Although Griffin implies that this "pre-emption" regulation was enacted in "1970" (Opp. at 9), it was not. Over the years, 49 C.F.R. section 232.13 has contained various railroad regulations, mostly substantive. *E.g.*, *CSX Transp., Inc. v. City of Plymouth*, 92 F.Supp.2d 643, 656 (E.D. Mich. 2000) (in 2000, section 232.13 mandated an "air brake test" after a train "sits idle"), *Burlington N. R.R. Co. v. State of Minn.*, 882 F.2d 1349, 1351 (8th Cir. 1989) (in 1989, section 232.13 "permit[ted] the use

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According to Griffin, this regulation "completely destroy[s] Petitioners' argument" that field pre-emption no longer exists. Opp. at 5.

Not so. Federal pre-emption "fundamentally is a question of congressional intent" (*English*, 496 U.S. at 78-79), which is found in *Congress'* statutory enactments, not an agency's regulations. Thus, courts do "not defe[r] to an agency's conclusion that state law is pre-empted." *Wyeth*, 129 S.Ct. at 1201. Federal agencies "have no special authority to pronounce on pre-emption absent delegation by Congress." *Id.* At most, an agency's opinion about pre-emption can be given "some weight," depending on the "thoroughness, consistency, and persuasiveness" of the "agency's explanation." *Id.*

Here, nothing indicates that Congress has "delegated" to any railroad-safety agency the "authority to pronounce on pre-emption." And the agency that issued section 232.13 did not "expla[in]" how field pre-emption can still exist despite Congress' express contrary intent. The agency's bare suggestion to "consider" field pre-emption lacks any "thoroughness" or "persuasiveness" – and thus any persuasive weight *See Wyeth*, 129 S.Ct. at 1201.

Moreover, this regulation's persuasive force is diminished further by the timing of its enactment,

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of a telemetry device to monitor brake pipe pressure") Only recently was section 232 13 assigned a regulation addressing pre-emption, effective January 12, 2009.

effective January 12, 2009, just days before the new President took office. Indeed, President Obama, shortly after taking office, issued an executive memorandum ordering review by his agency heads of all "regulations issued within the past 10 years" that purport to "preempt state law" to determine whether pre-emption is "justified." *See* Fed. Reg., Vol. 74, No. 98, at pp. 24693-24694.

In sum, the cited regulation from the eleventh hour of the prior administration, far from "completely destroying" petitioners' showing that Congress intends only one express pre-emption scheme, has neither binding nor persuasive value.

V. GRIFFIN FAILS TO REFUTE THE CONFLICT AMONG THE STATES AND CIRCUITS.

Next, Griffin fails to refute that this case presents a nationwide conflict, pitting the holdings of California, Alabama, and the Sixth and Ninth Circuits that implied field pre-emption still exists against the holdings of Pennsylvania and Washington that field pre-emption was obviated when Congress expressed its pre-emptive intent.[3] *See* Petition at 23-24.

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[3] Although Griffin tries to expand the conflict by claiming that several other courts have "issued opinions directly contrary to Petitioners' arguments here" (Opp at 17-18), those courts

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Griffin's attacks on the validity of the Pennsylvania and Washington cases holding that the only pre-emption is Congress' express pre-emption (Opp. at 18-25) lack merit, as shown below.

A. Pennsylvania: *Norfolk* has not been "impliedly overruled by this Court."

As petitioners showed, Pennsylvania holds (contrary to California *et al.*) that the "clear intent of Congress" is that field pre-emption is no longer "implied":

> The "clear intent of Congress," as "articulated in the [FRSA] of 1970," is "to permit state regulation of railroad safety until preempted," thus "mandat[ing] the conclusion that the federal government has not preempted the entire field." * * * "While the broad language of the [BIA] at one time could have been interpreted as reflecting Congressional intent to preempt the entire field of railroad safety, the enactment of [the FRSA's express pre-emption provision] no longer permits that reading."

Norfolk and W. Ry. Co. v. Pennsylvania Pub. Util. Comm., 413 A.2d 1037, 1041-1042, 1043 (Pa. 1980); *see* Petition at 24.

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again did not address the issue presented here, instead assuming that field pre-emption still exists and construing its *scope*

Griffin asserts that *Norfolk* supposedly "has been impliedly overruled by this Court" because the federal district court in *Consolidated Rail* "disagreed" with *Norfolk*, and the Third Circuit and this Court then summarily affirmed making the district-court opinion the "law of the land." Opp. at 18-19.

But as petitioners note (Petition at 31 n.6) and Griffin ignores, the district court found pre-emption in two *alternative* ways: express pre-emption *and* continued BIA field pre-emption. Petition at 26-27; *see Consolidated Rail*, 536 F.Supp. at 657. Although the Third Circuit and this Court summarily affirmed the district court's *outcome*, neither Court affirmed the judge's *reasoning* that BIA field pre-emption still exists. The Third Circuit simply "affirmed," not revealing whether it agreed with the finding of express pre-emption or of implied field pre-emption. *Consolidated Rail Corp. v. Pennsylvania P.U.C.*, 696 F.2d 981 (3d Cir. 1982). And this Court then summarily affirmed the Third Circuit, again without any indication of its reasoning. *Pennsylvania P.U.C.*, 103 S.Ct. at 1888; *see* Petition at 31 n.6.

Nevertheless, Griffin insists that this Court's summary affirmance validated the district court's reasoning – and thus "impliedly overruled *Norfolk*." Opp. at 20. Griffin even cites this Court's decision in *Mandel v. Bradley*, 432 U.S. 173, 97 S.Ct. 2238 (1977), for the proposition that a "[s]ummary affirmance" by this Court somehow validates the lower court's reasoning. But *Mandel* says precisely the opposite:

> Because a summary affirmance is an affirmance of the judgment only, the *rationale* of the affirmance may *not* be gleaned solely from the opinion below. When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the *reasoning* by which it was reached.

Mandel, 97 S.Ct. at 2240 (emphasis added).

Thus, the federal district court's decision in *Consolidated Rail* is not the "law of the land," nor does it somehow "overrule" the Pennsylvania Supreme Court's decision in *Norfolk*.

Finally, Griffin is wrong to assert that this Court should disregard *Norfolk* because that case's "validity" is supposedly "being questioned" in the Pennsylvania courts. Opp. at 20-21. As petitioners noted in their December 23, 2009, letter to this Court, a Pennsylvania appellate court just expressly *rejected* a challenge to *Norfolk*'s validity, following *Norfolk* to reject the defendant's claim of BIA "field" preemption. *See Atwell v. John Crane, Inc.*, ___ A.2d ___, 2009 Pa. Super. 246, 2009 WL 4844374 (Pa. Super. 12/17/09). Although Griffin claims (without support) that a "request for review by the Supreme Court of Pennsylvania is forthcoming" (Opp. at 21), nothing supports Griffin's claim that the Pennsylvania Supreme Court "may well" overrule *Norfolk* (*id.*) – or indeed that that Court will even grant discretionary review of *Atwell*.

Although defendants like Griffin may continue to attack *Norfolk* as being contrary to their supposed "avalanche" of authority, *Norfolk* is the law of Pennsylvania, being followed today by the lower Pennsylvania courts and thus presenting a conflict that warrants this Court's review.

B. Washington: *State v. Chicago* is "not a field preemption case" *because* field pre-emption no longer exists.

Petitioners showed also that the Washington Supreme Court, just after Congress enacted its express pre-emption provision, held that the BIA did not pre-empt a state locomotive regulation:

> We must conclude that, absent promulgation of federal administrative regulations relating to [locomotive] spark arresters, the Boiler Inspection Act [BIA] does not pre-empt the power of individual states to require such devices. This conclusion is supported by section 205 [the express pre-emption provision] of the [FRSA]. . . .

State v. Chicago, Milw., St. Paul and Pac. R.R. Co., 484 P.2d 1146, 1149 (Wash. 1971), *app. dismissed sub nom. Chicago, Milw., St. Paul and Pac. R.R. Co. v. Washington*, 404 U.S. 804, 92 S.Ct. 108 (1971); *see* Petition at 24.

In response, Griffin insists that *State v. Chicago* is "not a BIA/SAA field preemption case" but "an FRSA case" involving "express preemption analysis."

Opp. at 22-23. But that is the point. Because the Washington Supreme Court correctly recognized that BIA "field" pre-emption *no longer exists*, it looked for pre-emption under the only existing source – Congress' express provision.

Norfolk and *State v. Chicago* stand as the law of Pennsylvania and Washington – and thus raise a conflict, supporting review by certiorari.

VI. GRIFFIN FAILS TO REFUTE THAT THIS ISSUE AFFECTS THE RAILROADS AND RAILROAD-INJURY VICTIMS.

Finally, Griffin fails to refute that the continued imposition of broad field pre-emption (contrary to Congress' intent) weakens railroad safety and harms both railroad-injury victims and the railroads. *See* Petition at 25-36.

First, Griffin asserts that applying field pre-emption is not problematic because FELA supposedly "provides ample recourse for railroad *employees*." Opp. at 26 (emphasis added). But this ignores petitioners' showing that (1) FELA provides no "recourse" for injured *non*-employees, and (2) even employees cannot recover if they cannot show railroad negligence. *See* Petition at 35.

Next, Griffin contends that railroad safety is not compromised by immunizing defective-product manufacturers from tort liability because manufacturers can be subject to "civil penalties" for "violat[ing]" the

BIA. Opp. at 28-29. But the possibility of penalties does not eliminate the problem because (1) some defective products (like Griffin's asbestos brakes here) do *not* violate the former BIA, which never addressed asbestos in train parts, and (2) any possible penalties would not help either an injured *victim* (who would not recover) or the railroads (who would incur all liability).

CONCLUSION

For all of the foregoing reasons, Griffin fails to refute petitioners' showing that review by certiorari is warranted. This Court should grant the petition.

Respectfully submitted,

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